S. HRG. 103–490

S. 687, THE PRODUCT LIABILITY FAIRNESS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CONSUMER

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

SEPTEMBER 23, 1993

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S. 687, THE PRODUCT LIABILITY FAIRNESS ACT

THURSDAY, SEPTEMBER 23, 1993

U.S. SENATE,
SUBCOMMITTEE ON CONSUMER OF THE
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room SR–253 of the Russell Senate Office Building, Hon. Richard H. Bryan (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Moses Boyd, senior counsel, and Claudia A. Simons, staff counsel; and Sherman Joyce, minority staff counsel.

OPENING STATEMENT OF SENATOR BRYAN

Senator BRYAN. I would like to take this opportunity to welcome everybody to this morning's subcommittee hearing. This morning we will examine legislation to establish Federal product liability standards. This legislation, S. 687, was introduced by Senator Rockefeller and is cosponsored by Senators Gorton, Danforth, Dodd, and Lieberman. Senator Lieberman is joining us this morning and will share with us his views in a moment.

Product liability is a body of law that traditionally has been fashioned by the States through court decisions known as the common law, and more recently by actions of State legislatures. For more than a decade, this committee has wrestled with proposals to establish Federal uniform standards. The proponents have argued that such legislation is needed to ensure more efficiency and predictability in the system. They contend that the current system is costly, slow, inefficient, and hindering innovation and competitiveness on the part of U.S. business.

Opponents, on the other hand, argue that the current system is working properly to compensate victims. They contend that if changes in the system are needed, they can be appropriately implemented at the State level. They believe that the critics of the current system have failed to establish their burden of proof that, indeed, there is a basis for the establishment of Federal legislative action.

Today we will hear from witnesses who will represent both sides of this issue. I believe it is important for this subcommittee to build a record this session, as we have in the two previous sessions that I have been privileged to chair this subcommittee. We will hear from those witnesses shortly, but this morning we are joined by one of our distinguished colleagues who is a cosponsor of the legisla-

tion, and I would like to extend the invitation to him to offer his comments.

Good morning, Senator Lieberman. We are pleased to have you before the subcommittee.

STATEMENT OF HON. JOSEPH I. LIEBERMAN, U.S. SENATOR FROM CONNECTICUT

Senator LIEBERMAN. Good morning, Mr. Chairman. Thank you. Thanks to Senator Bryan, Senator Gorton, and members of the subcommittee for convening this hearing and allowing me to testify on S. 687, the Product Liability Fairness Act of 1993, of which I am an original cosponsor, along with Senators Gorton, Rockefeller, Danforth, and Dodd.

Mr. Chairman, I am for product liability reform primarily because I see it as a crucial part of any long-term strategy to bolster economic growth, job creation, and competitiveness. I strongly believe, and I would guess that the chairman would agree with me on this, that the key to renewing America's economic fortunes is reviving our traditional economic strength in manufacturing, although probably, in this age, doing it with regard to high-technology manufacturing.

To do this, we need to be designing, building, and bringing to market the next generation of high-quality, high-value added products that the world is going to need into the 21st century. But too often today when a company considers developing a product and bringing it to market, it runs squarely into our existing product liability system. The evidence continues to mount that product liability considerations are stifling innovation and product development. And that is particularly true in areas in which industry must innovate on the cutting edge of science and technology, where there is inherently risk.

Consider the following examples: Biogen, Inc., a biotechnology company located in Boston, decided not to pursue development of an AIDS vaccine because of the threat of potential product liability suits. In July 1992, Abbott Laboratories announced that it was dropping plans for human trials of a drug that could prevent HIV-infected mothers from transmitting the disease to their kids because of product liability concerns.

This year, product liability concerns drove several major suppliers of raw materials that are used to make medical devices to stop selling to medical device manufacturers. At a recent National Academy of Engineering conference on product liability and innovation, the president of a manufacturing company stood up and recounted how he decided to forgo development of a lifesaving breathing apparatus because of product liability concerns.

Harris Corp., a manufacturer of high-quality computer chips, developed semiconductor chips for heart implants, but delayed commercialization of the product pending negotiation of arrangements with its customer for sharing liability costs.

Mr. Chairman, these are just a few of the real examples of product liability's effects on innovation. But product liability concerns can cramp the innovative process in other ways as well. As one person told the NAE meeting I referred to earlier, "New ideas emerge from solving problems with old ideas." The problem is that our

product liability system can penalize manufacturers who spend the research and development time and resources to push the state of the art to solve old problems. New developments can often be used as evidence that old products were somehow defective.

Mr. Chairman, S. 687 does not address all of these issues, but it would make some critical changes in the law of punitive damages, joint and several liability, liability of product sellers, and liability for manufacturers of capital goods. I also urge the committee to examine whether we need to adopt some reforms in the evidentiary use of subsequent changes in design, sometimes called the "remedial repair doctrine," because of the effect of current law on innovation as I have described it.

And I also would encourage the committee to examine the question of whether companies should be liable for injuries resulting from misuse or alteration of a product, such as removal of safety features by an end user. Mr. Chairman, as one of Murphy's laws states, "it is hard to design a foolproof system because fools are so ingenious." These fools can add significantly to manufacturers' product liability costs.

I want to emphasize, finally, that even if S. 687, including the additional provisions that I have just recommended the committee consider, is enacted, it would not revolutionize the product liability system as we know it. It would merely bring about moderate change.

S. 687 balances businesses' need for greater predictability with the rights of injured individual plaintiffs to sue. And, in fact, for those individuals, it creates some new benefits. A nationwide statute of limitations that is more liberal than is available in many States. It also contains provisions that are designed to prod reluctant defendants into speedier settlements and use of alternative dispute resolution.

Mr. Chairman, the time has come for this body to consider these modest and moderate reforms in our product liability system. The fact is that our current system is broken: It is bad for both business and consumers. I think these reforms make sense. They are fair, and I urge the committee to report them out favorably.

Thank you, Mr. Chairman, for giving me this opportunity.

[The prepared statement of Senator Lieberman follows:]

PREPARED STATEMENT OF SENATOR LIEBERMAN

Mr. Chairman, Senator Danforth, members of the Committee, I thank you for allowing me to join you this morning to testily in favor of S. 687, the Product Liability Fairness Act of 1993, of which I am an original cosponsor. I thank the principal sponsors of this legislation, Senators Rockefeller, Danforth and Gorton for their continued leadership on this issue.

Mr. Chairman, I am for product liability reform because I see it as -a crucial part of any long-term strategy to bolster economic growth and competitiveness. I strongly believe—and I think the Chairman would agree with me on this—that the key to renewing America's economic fortunes is reviving our traditional economic strength in manufacturing. To do this, we need to be designing, building and bringing to market the next generation of high-quality, high-value added products the world will need in the twenty-first century. Our country has always been good at inventing, but too often in recent years has left those inventions for others to commercialize and ultimately manufacture. We need to turn this around, and I have been pleased to support the work of the Chairman of the full Committee, Senator Hollings, and other members of this Committee on S. 4, the National Competitiveness Act of 1993, which attempts to give a boost to product development and commercialization.

But when a company considers developing a product and bringing it to market, it runs squarely into our product liability system. The evidence continues to mount that product liability considerations are stifling innovation and product development. This is particularly true in areas in which industry must innovate on the cutting edge of science and technology.

Consider the following examples:

- Biogen, Inc., a biotechnology company, located in Boston, Massachusetts, decided not to pursue development of an AIDS vaccine because of the threat of potential product liability lawsuits.
- In July 1992, Abbott Laboratories announced that it was dropping plans for human trials of a drug that could prevent HIV-infected mothers from transmitting the disease to their kids because of product liability concerns.
- This year, product liability concerns drove several major suppliers of raw materials used in to make medical devices to stop selling to medical device manufacturers. One such supplier has already spent millions of dollars defending cases involving a total of about $50 in sales to an unaffiliated manufacturer—and the supplier has yet to be found liable.

As a result, medical device manufacturers will have to spend time and money to develop new sources of supply rather than new products. Of even greater concern, these medical device manufacturers will be cut off from access to future advances in materials by these major materials suppliers. This will slow, not speed, the development of newer, safer and more effective medical devices.

- At a recent National Academy of Engineering conference on product liability and innovation, a member of the audience—the President of a manufacturing company—stood up and recounted how he decided to forego development of a lifesaving breathing apparatus because of product liability concerns.
- At the same NAE conference, DuPont revealed that it had passed up an opportunity three years ago to supply raw materials and technical services in the development of earthquake shock absorbers for buildings. The risks and costs of litigation after an earthquake were too high to justify the sale of a relatively small number of pounds of material each year at $2 per pound—the market price.
- Harris Corporation, a manufacturer of high-quality computer chips, developed semiconductor chips for heart implants, but delayed commercialization of the product pending negotiation of arrangements with its customer for sharing liability costs.

These are just a few of the concrete examples of product liability's effects on innovation. But product liability concerns can cramp the innovative process in other ways as well. As one person told the NAE, "new ideas emerge from solving problems with old ideas." The problem is, our product liability system can penalize manufacturers who spend the research and development time and resources to push the state of the art to solve old problems. New developments can often be used as evidence that old products were somehow "defective."

To illustrate this point, I would cite a hypothetical case presented to the NAE. Suppose that an engineer at an auto company comes up with an idea for a new antilock braking system that will improve braking performance, at what he or she speculates would be little or no difference in cost. This engineer writes down his or her idea to present to superiors. Even if the idea doesn't pan out technically, this paper could become evidence used to show it was "possible" to design a better braking system. And if the idea pans out and the company starts to install the new brakes, in some jurisdictions the new brake design can be used as evidence that the older design was defective. The National Academy of Engineering was told that these liability concerns today chill the self-critical scientific and technical evaluation process critical to innovation, and in some cases slow the implementation of those developments that do come along.

Mr. Chairman, S. 687 does not address all of these issues, but it would make a few critical changes in the law of punitive damages, joint and several liability, liability of product sellers, and liability for manufacturers of capital goods. Because of the effect on innovation, I also urge the Committee to examine whether we need to also make adopt some reforms in the evidentiary use of subsequent changes in design—sometimes called subsequent remedial repair doctrine. And I encourage the Committee to examine the question of when companies should be liable for injuries resulting from misuse or alteration of a product, such as removal of safety features by an end user, which is in the House bill. As one of Murphy's laws states, it is hard to design a foolproof system, because fools are so ingenious. But these fools can add significantly to manufacturers' product liability costs.

I want to emphasize, however, that even if S. 687 included these additional provisions, enacting S. 687 would not destroy the product liability system. S. 687 balances businesses' needs for some greater predictability with the rights of injured

plaintiffs to sue. For those individuals, it creates a nationwide statute of limitations that is more generous than is available in many states. It also contains provisions that are designed to prod reluctant defendants into speedier settlements and use of alternative dispute resolution.

One statistic I heard recently dramatizes the need for reform. According to the Insurance Services Office, legal defense costs for product liability amount to 70 cents for every dollar of indemnity paid out to victims. If you assume that of the victim's $1, his or her lawyer gets 33 cents, this means that the liability adjudication system—mostly lawyers—get $1.03 for every 67 cents received by victims. This is simply too much.

The time has come for this body to consider modest and moderate reforms to our product liability system, such as those contained in S. 687. Our current system is broken: it is bad for business and bad for consumers. These reforms make sense, and their time has come. They are fair. They are what America—its consumers, its businesses and its workers—need to compete. I urge the Committee to promptly mark-up S. 687 and report it favorably to the full Senate.

Senator BRYAN. Senator Lieberman, thank you very much. We are pleased to have your testimony, and I note that we have got a rollcall vote coming up shortly, so if there are no questions that the members of the subcommittee have, you are—it looks like the ranking member of the subcommittee may have a question.

Senator GORTON. No, the ranking member does not have a question. He just wants to express his admiration for Senator Lieberman, who is an original thinker and works these problems out for himself and then shares his ideas with us. And not only ideas which are worth thought, but in a language which leaves them stuck in our memory. I appreciate your support on this bill and I particularly appreciate the way in which you express yourself on it.

Senator LIEBERMAN. Thank you, Senator Gorton. It is my pleasure to work with you.

Senator BRYAN. Thank you, again, Senator Lieberman.

Senator LIEBERMAN. Thank you, Mr. Chairman.

Senator BRYAN. Now let me defer to the ranking member for an opening statement that he might care to make as a principal and primary cosponsor of the legislation.

OPENING STATEMENT OF SENATOR GORTON

Senator GORTON. Well, again, Mr. Chairman, I have a written statement here and I would ask that it be included in the record as if read in full.

Senator BRYAN. That will be the order.

Senator GORTON. And I will only say that we are hardly at the beginning of the road in this connection. This committee has been discussing product liability since well before I first became a member of the committee. The problem is one that remains. The degree of public consciousness of the fact that our present system is broken and needs to be fixed seems to me to be increasing. We do face a larger and larger number of businesses which have their desire and ability to put new products on the market limited, year after year, because of fears of the present product liability system.

We also, I think, as proponents of these bills, have learned a great deal in past years. This is a more modest proposal, particularly than many of those in the early and mid-1980's, but it nevertheless can at the same time provide better justice in a shorter period of time and with fewer transaction costs for those who are injured and have legitimate claims against manufacturers or sellers

of products. And at the same time, it can provide a degree of protection against lawsuits that I think are largely without merit, and from huge transaction costs and the risk of greater transaction costs on the part of those who produce them.

There are provisions in this bill related to punitive damages, both setting a national standard as to how they shall be arrived at and, to a certain extent, the tests by which they should be approved. I come from a State, Mr. Chairman, which does not allow punitive damages at all. I do not think that means that products are less safe in the State of Washington than they are elsewhere. It certainly has not reduced the number of legitimate claims which are filed for product liability.

So, the limitations on punitive damages here, the attempt to make a more direct correlation between the degree of responsibility and the degree of liability, I believe to be major steps forward.

[The prepared statement of Senator Gorton follows:]

PREPARED STATEMENT OF SENATOR GORTON

Mr. Chairman, I would like to thank you and Senator Hollings, the distinguished Chairman of the full Committee, for scheduling today's hearing. Product liability reform is a very important issue. As an original cosponsor of S. 687, the Product Liability Fairness Act, I am pleased that the Consumer Subcommittee is considering this important legislation.

I also would like to thank Senator Rockefeller, the author of S. 687, for his tireless efforts to move this legislation. am confident that, under his leadership, the Committee will be successful in reporting this measure so it can be considered by the full Senate early next year.

Mr. Chairman, this issue is not new. The Commerce Committee has devoted considerable time and energy in the past decade to improve the current product liability system. And, the Committee has received overwhelming evidence that reform is needed. We know that cases take years to complete, and the delays often force seriously injured people to settle for inadequate amounts so they can begin to pay their bills. The result is a system that provides a windfall for those with minor injuries, while those with serious injuries receive only a fraction of their losses.

We also know that the legal system is too costly. In her testimony, Ms. Nimmons provides evidence of this problem and all of its ramifications. The cost of the product liability system extends to those products that never come on the market. Although examples of this problem rarely come to light, Mr. James Vincent, Chief Executive Officer of Biogen, Inc., a biotechnology company in Boston, has submitted testimony stating that his firm declined to develop an AIDS vaccine because of liability concerns. In light of the debate that is beginning on our health care system, I believe that the decision not to develop an AIDS vaccine is a national tragedy that we must address.

I support S. 687 because it is a fair, balanced proposal Unlike previous bills that limited an individual's right to sue, this bill takes no extreme positions. For example, the provision on joint and several liability does not affect state laws with respect to economic damages, but it limits a defendant's responsibility for noneconomic damages, such as pain and suffering, to the defendant's proportion of fault as determined by a jury. The provision does not cap or in any way limit the amount of recovery a claimant can receive. With respect to punitive damages, which have been the subject of recent controversy, the bill establishes a uniform standard of proof based on past recommendations of the American Bar Association and a 1991 the American Law Institute that is the basis for the Restatement 3rd of Torts, which is now being drafted. My State of Washington does not allow punitive damages in product liability cases, and the bill does not require Washington to allow punitive damage awards.

The bill also addresses an unfair situation for claimants in those states where the statute of limitation begins to run at the time of injury. Such a system is unfair to many injured persons who may not realize they are ill until many years after they are exposed to a toxic product, such as asbestos. The bill addresses this inequity by providing that the two-year statute of limitation does not begin to run until the claimant discovers his injury and its cause. This provision preserves an individual's right to receive compensation. S. 687 also includes incentives for parties

to settle their disputes out of court through settlement offers or the use of voluntary alternative dispute resolution procedures. The purpose of these provisions is to avoid expensive and time-consuming litigation whenever possible.

Mr. Chairman, this bill includes several changes from last year's bill. These changes are an attempt to respond to the criticisms of opponents. I share Senator Rockefeller's optimism that this bill is fair and balanced, and that it should be considered promptly by the Commerce Committee in executive session.

I want to thank today's witnesses for coming here, and I look forward to hearing their testimony.

Senator BRYAN. Senator, we thank you very much for those comments. Let me defer now to Senator Burns for any opening statement he would care to make.

OPENING STATEMENT OF SENATOR BURNS

Senator BURNS. Thank you, Mr. Chairman. And I want to thank you for having these hearings. I guess we have been talking about product liability ever since I have been in the U.S. Senate, and we are starting the process all over again, although I think there is a little bit of a difference in tack this year than we have taken before.

I have talked to several of the people that live in Montana, especially over in western Montana, that have to do research in their work. And they are saying that something should be done in this respect to address the fear they have, especially in the area of research and development for new technologies which is needed for new products to come on the market.

I want to associate myself with the words of my friend from Washington, Senator Gorton, this morning. I think he has a very good grasp of these issues. And also with the words of Senator Lieberman, who, it is true, is an original thinker. And as we approach this, we find that a major loss in productivity in this Nation comes from frivolous lawsuits and lawsuits that have no grounds, the unjustified claims, the way they are paid and the way they are handled. Sometimes they are accomplished through dirty tricks. But then, who are we to judge that.

So, I appreciate your leadership on this and I will put my statement in the record as if given, and I appreciate the opportunity.

Thank you very much, Mr. Chairman.

[The prepared statement of Senator Burns follows:]

PREPARED STATEMENT OF SENATOR BURNS

I thank the Chairman for holding these hearings on a measure I think is long overdue. For more than a decade, this Committee has been trying to reform this country's product liability laws, only to find its efforts thwarted at some point in the legislative process. The call for change is bi-partisan in nature, and its only opponents appear to be a group of money-hungry lawyers, bent on robbing our citizens of access to new technologies and business opportunities. In too many cases, these people and their clients appear to have one priority: clogging the nation's court dockets and profiting at the expense of entrepreneurs and companies which can be driven out of business by the punitive damages of just one lawsuit.

I have heard from dozens of Montanans on this issue, and I agree with them: Bring the true violators of product liability laws to justice, but streamline the process to keep so-called frivolous lawsuits and sky-high punitive damages out of the courts. We know that when it takes an average of five years to deliver a product liability settlement, something is wrong with the system.

Small business is the lifeblood of our economy in Montana, and the impact of product liability issues on our state and others can be devastating. RIBI Immunochem Research in Hamilton, Montana is just one example of a company that does outstanding, state-of-the-art work yet lives in fear of frivolous lawsuits.

This company and hundreds of other biotechnology firms need close to 20 million dollars to be fully protected from product liability suits. That's an annual premium of 150 thousand dollars—and that gets them only a million dollars worth of insurance. The firm decided to put its money into research and go uninsured, meaning one lawsuit could wipe out this business, and its shareholders, 25 percent of whom live in my state.

Some industries are watching their businesses move offshore, where foreign manufacturers with less stringent product liability laws are going like gangbusters. In, short, the current patchwork of state product liability laws is costing Montanans access to lifesaving new technologies, and jobs.

S. 687 takes some important steps in creating uniform standards for product liability—that's why co-sponsor this bill. The liability exposure of the machine tool industry and and some wholesalers is limited, and these provisions could drive down insurance costs and lead to a system which awards damages more fairly. The legislation also eases unfair product liability burdens on the makers of aircraft and related parts, and on drug manufacturers. These are the kinds of moves Montanans applaud—action which protects the consumer without denying jobs or progress in medical research. S. 687 promotes the resolution of product liability disputes out of court—and that is a welcome solution for my constituents who are anxious to see some relief in our judicial system.

I look forward to hearing the testimony from witnesses representing many viewpoints on this bill, and I again thank the Chairman and the distinguished Senator from West Virginia, Mr. Rockefeller, for attempting to bring much needed reform to our court system and a change in thinking to the legal profession.

Senator BRYAN. Thank you very much, Senator Burns, and your statement, together with Senator Gorton's statement, will be in the record of these proceedings.

Let me, on this occasion, invite the first of our two distinguished panels to join us. On the first panel we have Representative Mike Box of the Alabama House of Representatives, representing the National Conference of State Legislatures; Mr. Robert Pritzker, president of the Marmon Group, representing the National Association of Manufacturers; Ms. Julie Nimmons, chief executive officer of the Schutt's Sports Group; and Prof. Lucinda Finley of the University of Buffalo School of Law.

We are pleased to welcome you here to the hearing this morning, and as soon as you are comfortably seated we will begin with Representative Box.

Good morning, Mr. Box.

I would state for the record, we have the text of your statement. And so that we get through and give everybody an opportunity to be heard, I would like to ask you to kind of confine your comments to about 5 or 6 minutes, if you will, so that the panel will have plenty of time for questions, and I know there will be.

STATEMENT OF HON. MIKE BOX, ALABAMA HOUSE OF REPRESENTATIVES, ON BEHALF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mr. BOX. Thank you, Mr. Chairman, and good morning to you and members of the committee. My name is Mike Box. I am a member of the Alabama House. I serve there as the vice chair of the House Committee on Commerce, Transportation, and Utilities, and I am also a member of the executive committee for the National Conference of State Legislatures, and it is in that capacity that I appear before you today.

Members of the committee, the National Conference of State Legislatures opposes Senate bill 687 because State authority in civil justice is central to maintaining a vital Federal system. The Fed-

eral system expects diversity to exist among the States, constitutions, and laws, and the proponents of this legislation have really given no compelling reason to disrupt the evolution of State civil justice.

Rather than bringing certainty and predictability to the law of product liability, the imposition of Federal rules on top of existing State laws will create new uncertainties and and confusion within State courts and legislatures as these bodies seek to interpret the new Federal law.

One of the strengths of America is its diversity. The ability of States to act in response to changing economic conditions or technological changes is a vital part of maintaining our competitiveness in the world economy. States are better situated to adapt to change than the national Government.

Although some have argued that Senate 687 is a modest proposal for change, it opens the door to ever more significant intrusions in the State tort law. One of the greatest dangers to federalism is this incremental change that is proposed by the current bill. Courts may find it easier to uphold them, even though the cumulative effect might be to undo the balance of powers between the Federal Government and the States.

Preemption extinguishes other expressions of self-government. This fact should make Congress especially wary of any justifications for preemption. The interest that may be served by preemption must meet a high standard in order to balance the loss of citizens' power to express themselves through their State legislatures.

Mr. Chairman, I thank you for the opportunity to testify this morning, and I will be glad to respond to any questions the committee may have.

[The prepared statement of Mr. Box follows:]

PREPARED STATEMENT OF REPRESENTATIVE MIKE BOX

Good morning, my name is Mike Box. I am a state representative from Mobile, Alabama. I serve as Vice Chair of the Alabama House Commerce, Transportation, and Utilities Committee, and as a member of the National Conference of State Legislatures' (NCSL) Executive Committee. I am here on behalf of NCSL, which serves all of the nation's legislatures and represents their interests in state-federal policy matters. Since 1983, NCSL has consistently testified in favor of permitting states to retain authority to reform their civil justice systems without interference from the national government. At our recent Annual Meeting, we reaffirmed our strong opposition to preemption of state tort law that would mandate national standards for product liability lawsuits.

Over the past several years I have worked for reforms in Alabama's justice system, both criminal and civil. In the most recent session of our legislature, I was a co-sponsor, for example, of legislation that would have set a standard for punitive damages. The bill passed the House, but died in the Senate. This is personally frustrating for me, but I am not ready to concede that Congress must override the Alabama Senate. And I am not so bold as to believe that our legislature has the answers that are appropriate for every other state. In fact, I think that it is important for our federal system that states serve as laboratories for social and economic experiments without risk to the rest of the country.

This is a matter that should be and continues to be acted upon in the state legislatures. Product liability is only a small part of the tort system, but forced changes in-this narrow area of the law at the national level would reverberate throughout state civil justice systems. My convictions on the need for tort reform in this country are held in check by my greater concern for protecting the principles of constitutional federalism as well as by practical considerations.

In addition, the American Bar Association is spearheading a drive to create recommendations for state courts and state legislatures. More than fifty organizations ranging from the Business Roundtable to the American Trial Lawyers' Association

have been brought to the table for these important discussions. NCSL is one of the parties to these discussions. The ABA project has working groups seeking consensus on early settlement, case management, and the discovery and trial process. The value of this effort is not only in its emphasis on state action, but on its broad approach to civil justice reform, rather than selecting one narrow area of tort law for change.

Under NCSL's federalism policy, preemption may be warranted in specific instances only when it is clearly based on a provision of the U.S. Constitution authorizing such preemption and only when it is clearly shown (1) that the exercise of authority in a particular area by individual states has resulted in widespread and serious conflicts imposing a severe burden on national economic activity or other national goals; (2) that solving the problem is not merely desirable, but necessary to achieve a compelling national objective; and (3) that preemption of state laws is the only reasonable means of correcting the problem. NCSL believes that this test has not been met by those advocating preemption of state product liability laws.

The issues of proper compensation for injured persons and suitable protections for businesses are matters of social values and public policy that should be addressed at the state level. Only with clear proof of the need and of the effectiveness of national rather than state solutions should we consider the sweeping preemption of state laws and constitutions contemplated by S. 687. In our view, proof of need and effectiveness is lacking.

Our objections to S. 687 are several. First, uniformity and predictability are illusory goals. Uniformity has no greater intrinsic value than the value of self-government by states. More likely is the prospect that this sea change in the law will cause years of uncertainty, unpredictability and an increasing flow of state claims being litigated in the Supreme Court. Such risks should not be undertaken based upon speculation.

Even if the federal government were to become involved through this bill, we would expect to look for continuous changes, not just in the courts, but in the federal legislature as different interest groups pressed their claims on behalf of the manufacturers or consumers. State courts would be expected to continue to adjust to interpretations and amendments in the federal rule of law. State legislatures would be unable to respond to the interpretations that would affect their constituencies. The bill would set an unprincipled precedent for further erosion of state authority over their tort liability systems.

After years of seeking uniformity, certainty and predictability for the alleged purpose of reducing insurance rates, testimony by the insurance industry at the Senate Commerce Committee hearings several years ago underscored our objections to the bill when it was stated the proposed product liability preemption bill would not affect insurance rates. Am I mistaken in my belief that reduced costs was what this legislative battle was all about? If we are not even going to see reduction in costs to businesses, surely the need for such legislation has not been shown. Enthusiasm for "competitiveness" should not generate support for proposals built on false hopes.

ACCOUNTABILITY, INNOVATION AND RESPONSIVENESS DEPEND UPON FEDERALISM

In the past, NCSL has tried to impress upon Congress our constitutional standing as partners in the federal system. We have spoken of the Tenth Amendment and its purpose in reserving powers to the states and to the people. Justice Sandra Day O'Connor wrote perceptively in the recent case of New York v. United States that federalism was not intended to preserve the power of state and local officials but, as a counterbalance to federal power, to preserve individual liberty. As stated in NCSL policy on Federalism:

> Our American federalism creatively unites states with unique cultural, political, and social diversity into a strong nation. As a carefully reasoned foundation of the Constitution, federalism can protect liberty through the sharing of power between levels of government. When one level becomes deficient or engages in excesses, the other level of government serves as a channel for renewed expressions of self-government. This careful balance enhances the express protections of civil liberties within the Constitution. Under the Tenth Amendment, broad powers are reserved to the states and to the people. Within the system of dual sovereignty, states serve not only as a bulwark of freedom but also, and perhaps more importantly, as a framework for adapting to change. As Justice Brandeis wrote, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311(1932), (Brandeis, J., dissenting).

I wish that these arguments in themselves would frame your consideration of this broadly preemptive legislation, however, perhaps more persuasive are practical reasons for allowing states to continue to act on behalf of our shared constituencies. States continue to press ahead with various tort reform proposals in order to balance the needs of consumers and business. However, there is little consensus on what works best, and therefore, adopting a particular model for national policy would be premature and present risks to the nation, which Justice Brandeis prudently noted could be avoided by permitting action at the state level.

DIVERSITY ENHANCES COMPETITIVENESS; UNIFORMITY IS A MIRAGE

We ask that you consider carefully the importance of accountability, innovation and responsiveness in government. Arguments for uniform laws as a means of promoting competitiveness ignore the advantages of a decentralized and federal system of civil justice. Pragmatic experimentation in response to emerging social and technological changes is vibrant at the state and local level. John Osborne describes the activities of states in the area of economic development and competitiveness in his recent book "Laboratories of Democracy." Osborne's influence is palpable in the recent Report of the National Performance Review by Vice President Gore, which reiterates the need to foster entreprenеurial government and decentralized decision-making. Our commitment to economic competitiveness is shown by our many initiatives to set up public venture capital funds, to establish programs to stimulate technological innovation, to expanding direct international markets for our products and to overhaul our education systems.

Each time a product liability preemption bill appears before the Committee there seems to be a new untested reason for accepting it. First, there were claims of an insurance crisis, then competitiveness became the key word in Washington, then as those reasons were dispelled, our concern for technological innovation was used as a prop for preemption. Surely, these must be considered on their own merits, but skepticism is demanded in the examination of the reasons presented to the committee.

Proponents have argued that U.S. manufacturers trying to make sense out of different state product liability laws lose out to foreign competitors who capture American markets. This argument is specious. It cannot be seriously suggested that foreign competitors understand our state laws better than our own domestic manufacturers. Breaking down state borders would arguably be more beneficial to our overseas competitors than to American businesses that know the laws. Japanese and other foreign manufacturers are subject to suit for product defects in state courts just as American manufacturers are.

Proponents of national product liability law seem particularly interested in aspects of Japan's uniform system of tort laws that would limit discovery and punitive damages. But to pick and choose which aspects of the Japanese system or culture to copy in order to increase our competitiveness is simplistic. Japan is a unitary state and not a federal union. Its people are homogeneous and it is geographically compact. The beauty of America is its diversity and its geographical, cultural and economic expansiveness. Only a federal system that is carefully preserved can accommodate such diversity.

Our shared concern for competitiveness should cause us to focus on more critical needs. For example, in a study a few years ago, the Office of Technology Assessment listed lowering the cost of capital as one of the most important steps to improve our competitive posture. Other steps include investment in human resources and promoting long-term research and technology transfers. Caution should dictate that the national government correct what it already has authority to do, rather than risking the uncertainties that will surely result from the overlay of federal tort law onto state jurisprudence.

INCREMENTAL EROSION POSES DANGERS

The proponents of S. 687 may argue that this is a relatively modest bill because it does not cap attorney's fees or limit joint and several liability beyond non-economic damages. However, the "Product Liability Fairness Act," S. 687, is radical because it opens the door to substantially greater federal intrusions. It may appear modest to some, but that is only because its backers have as a last resort pursued incremental expansion into the realm of state authority. Already, interested persons are ready to make more significant changes to state tort law. Some would include a "state of the art" defense, provide additional limits to punitive damages, extend the limit on joint and several liability, and broaden the protection under the statute of repose. Indeed, one problem with addressing federal product liability legislation separately from other aspects of tort reform is that the civil justice system is an

organic whole, where changes in one area without regard to the rest will have destabilizing effects on the whole system.

Professor William Van Alstyne of Duke University Law School warns that congressional incursions into state powers are most dangerous when done incrementally, because judges can find some colorable ground to uphold them. By advancing upon states through means that appear "unegregious at each step * * * the judicial capacity to gain any clear purchase on any seemingly decisive distinction at any particular step is strategically undone." Van Alstyne, "Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea," 1987 Duke Law Journal, 769, 798 (November 1987).

Proponents of preemption, after nearly fifteen years in the field, now seem determined to win by adopting the strategy of avoidance. Instead of urging a law they had hoped for, proponents of uniform product liability have set their sites on passing one that is arguably of little value to them, but which opens the door to the incremental advances that would, with the assistance of sympathetic federal judges, effectively erode state tort systems. The Senate Commerce Committee Report from the 101st Congress cites constitutional authority to act in this arena under the Commerce Clause of the Constitution. The Report contends that such preemptive legislation would not "offend" the Tenth Amendment's recognition of state sovereignty. S. Rep. No. 101-356, p. 25. Unfortunately, such unsympathetic interpretations of the Tenth Amendment have eviscerated it.

STATES CAN ADAPT TO CHANGE BETTER THAN CONGRESS

Proponents of a uniform national law should be warned that predictability in any legislative body, state or federal, is impossible. Our seats change; our constituents' demands change. A national law might not always favor the interest that wins an advantage today. Future Congresses may establish joint and several liability or extend the statute of limitations. The fact that this legislative proposal or ones similar to it have been before Congress for more than a decade without agreement, while state courts and legislatures have been active in changing rules and passing reforms, should give pause to members of this committee. With states out of the picture, the adaptation of the law to the marketplace will become more problematic.

Congress is simply less prepared institutionally than state legislatures to deal with periodic adjustments to tort law. Just as new theories of strict liability were introduced by states to respond to new uncertainties in the marketplace, so now adaptations to market changes are most appropriately. developed at the state level. For instance, if there is an appropriate remedy for a person harmed by a drug of uncertain origin, state laws should be allowed to evolve to determine appropriate remedies. Theories of market share, enterprise or alternative liability are more appropriately addressed at the state level. National legislation would freeze the fluid development of the law, and depending upon the make-up of Congress, experiments with new theories of liability could have sweeping detrimental effects upon consumers or producers.

Professor Van Alstyne reminds us that it is "the likelihood of continuing differences * * * that is expected to characterize custom, actual practice and substantive law from state to state, all without recourse to Congress on most matters. Diversity and pluralism are, in short, the suppositions (one may say 'the very essence') of federalism. They are its nature, not its aberration, i.e., not a condition which, when it appears, enables Congress to take over the field." Van Alstyne, ibid., 775. The differences that exist among states, combined with the free mobility of our citizens, serve to make federalism work. As we legislate in the states, we are responsive to the presence of neighboring states that may have more attractive policies. Thus federalism acts as a check upon itself. We should not unnecessarily risk nor casually abandon the federalist principles so deeply ingrained in our Constitution and our culture.

PREEMPTION CREATES NEW UNCERTAINTIES

That "differences would most likely remain" in state laws after the adoption of a national product liability law was the conclusion of a report of the General Accounting Office. The study suggested that variation would be reduced, but the quest for uniformity would once again prove illusory. General Accounting Office, Product Liability: Verdicts and Resolutions in Five States. p. 52 (September 1989). The report calls into question the need for certain tort reforms, but perhaps more importantly, its failure to make any recommendations and its measured tone suggests that a crisis of national proportions requiring broad preemption, such as envisioned by S. 687, does not exist.

In order to see that uniformity would not be achieved under S. 687, one can look at what would happen with punitive damages. The bill would raise the standard of proof for recovery of punitive damages to "clear and convincing evidence." The conduct would have to be "conscious, flagrant indifference." The law of punitive damages has developed by statute or common law in each of the states. Because most states have already established a higher standard of proof for punitive damages, the federal standard adds little but confusion.

Descriptions of conduct subject to punitive damages vary from state to state. Creating a federal overlay of "conscious, flagrant indifference" will not bring uniformity, because each state will have to rely on its own experience to interpret the meaning of those terms. Terms used by the courts of the states to encompass such conduct include the following: malicious, wanton, willful, reckless, grossly negligent, extreme or exceptional, fraudulent or oppressive. Will courts interpret the federal rule as being encompassed within the state's terminology or will they feel compelled to develop a new interpretation of the standard of conduct? The Supreme Court as the final arbiter would have little to guide it other than state law.

Under Section 102 of S. 687, states with alternative dispute resolution mechanisms would be affected differently than states without such mechanisms. Mechanisms in place after careful consideration of the balance of interests in the states would have to give way to choices influenced by national interest groups. Again, personally, I believe that alternative dispute resolution is an admirable objective, but each state should determine how such procedures fit into its civil justice system.

PREEMPTION EXTINGUISHES COMMUNITY EMPOWERMENT

The accelerating pace of preemption over the past two decades can contribute to both the cynicism of the American voter and to the loss of the sense of community. By definition, every preemptive law diminishes another expression of self-government. More than half of all preemptive national laws in our two centuries have been passed since 1970, according to a study of the U.S. Advisory Commission on Intergovernmental Relations.

Instead of exhibiting a distrust of the exercise of democracy at the state level, we urge this committee to reaffirm a commitment to federalism by preserving values of community and participatory democracy. Professor Donald Kanter in his book, The Cynical Americans notes: "In citizen and country alike, there seems to be a loss of faith in people and in the very concept of community." This sentiment was more recently reiterated in a study by the Kettering Foundation that reports that people are involved in public action at the local level, but feel alienated from the decision process in Washington.

Expression of community values through state legislation is stymied whenever Washington occupies a field. Perhaps even more evident is the confusion facing voters in understanding which level of government is responsible for particular legislation affecting them. Under the proposed bill, the federal government would inject itself into the local courtroom, and parties would end up resolving differences in an unprecedented manner in the Supreme Court of the United States. Accountability in government would be diminished. The purpose of voting for state legislators evaporates when his or her actions in response to community concerns are constantly preempted by or mandated from Washington. The paradigm of empowerment is not only important to democracy, but also to our competitiveness internationally.

CONCLUSION

NCSL asks this committee to reject S. 687 because it addresses a matter that can and should be considered at the state level. The bill would cause confusion and uncertainty in the application of state law and would offer no serious aid to competitiveness. Before voting to preempt your state's laws based upon speculation and vague promises, you should examine the laws that have evolved in response to community needs in each of your states through the courts and legislature. By rejecting S. 687 you preserve important prerogatives of state legislatures, and by doing so, you help preserve local self-government and the values of community.

Thank you very much.

Senator BRYAN. Thank you very much, Representative Box.

We will next hear from Mr. Pritzker, the president of the Marmon Group, representing the National Association of Manufacturers. Mr. Pritzker, good morning, and we have a copy of your statement now, and that will be made a part of the record as well.

STATEMENT OF ROBERT PRITZKER, PRESIDENT, MARMON GROUP, REPRESENTING THE NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. PRITZKER. Good morning, Mr. Chairman, distinguished members of the committee, my name is Bob Pritzker, and I am president and CEO of the Marmon Group, a Chicago-based management service organization of more than 60 autonomous manufacturing and service companies worldwide. Together, they have annual sales of just over $4 billion and employ more than 27,000 persons.

I am the incoming chairman of the National Association of Manufacturers and will formally assume that role in a couple of weeks. I thank you for this opportunity to testify on behalf of the NAM and manufacturers on the issue that is of paramount importance to me as an engineer and businessman, and to the NAM as representatives of this country's manufacturers.

The NAM's membership includes medium, large, and 9,000 small manufacturing companies. It is worth noting that 80 percent of NAM's members employ 500 or fewer employees, and it is well worth noting that it is primarily the small companies where job growth is occurring and where good jobs are being created.

I can think of no more important issue to inaugurate my tenure as NAM chairman than that of product liability reform. This is an issue that cuts across all sectors of manufacturing industry, and is having an increasingly harmful impact on each and every sector of our industry.

I come before you today to urge you to support bill S. 687, the Product Liability Fairness Act. Passage of this measure would signal to American manufacturers of all sizes that Congress is serious about encouraging economic growth, enhancing the ability of American businesses to compete, and creating jobs.

Before I continue, I would like to extend my warm thanks to Senators Rockefeller, Gorton, Lieberman, Danforth, and Dodd for their dedicated work in making this a bipartisan effort aimed at securing much-needed reforms toward our current system of product liability laws. With this kind of leadership, I feel certain that Congress will enact the modest but essential reforms in S. 687.

The impact on American manufacturers. It is time to enact product liability reform. The impact of our current product liability laws is a major concern for American manufacturers, touching all aspects of operations. For the smaller manufacturer, the impact is magnified.

The 12-year evolution of this legislation has yielded a bill that provides to manufacturers some relief from overwhelming litigation and transaction costs while incorporating substantial consumer protection provisions. Passage of S. 687 is critical to manufacturers, to business, to the consumer, and to our economy.

We firmly believe that the liability crisis does not stem from the fact that U.S. manufacturers produce shoddy products while foreign manufacturers produce safe ones. Rather, foreign manufacturers are not subject to the same laws to the same degree we are.

Under the current product liability system, substantial monetary and human resources are diverted from the No. 1 manufacturing objective, creating and producing safe, quality goods. Simply put, this means that the more money spent on litigation, the fewer dol-

lars there are for vital activities of product development, innovation, and actual production. Economic growth and job creation are hampered when year after year significant resources are consumed by costly and often questionable products liability claims.

Senators, I would like to give you a specific example from one of our related companies. I know it is often claimed that everything is anecdotal about product liability, but I must tell you, I could spend the rest of the day and probably tomorrow from memory giving you crazy examples in our companies, but let me give you one.

About 12 years ago an associated company made a dump truck body which was affixed to a Ford truck. The vehicle was made properly and complied with all safety laws. It was sold to a user. Some 5 years later, a law was passed which required a backup beeper on all new trucks, which is still questionable as a safety device.

Years after the law was passed, and at least 11 years after the truck was sold, the vehicle was backing up. The user had stationed someone to look to see what was behind the truck. It was difficult for the driver to see. There was a young man in the way. The person designated to watch warned the young man to get out of the way. He did not. The truck ended up hitting him and killing him.

The issue was taken up by a plaintiff's lawyer who settled with the Ford Motor Co. for $1,200,000, I am told. They pursued the case with the dump body manufacturer, which had stopped making the product 10 years before. This incident happened in 1990, but the case was not totally settled until 1993. The court awarded the plaintiff $25 million. This was many times the net worth of the company. A settlement was finally made which used up most of the equity of the company, which has essentially had to go out of business.

It seems to me it did not serve a whole lot of purpose. The mother of the decedent was well-compensated in the first place, and the dump body manufacturer really had very little to do with this accident, but I cannot give you any further details or names, because part of the settlement—and I cannot tell you what the settlement was, because part of the settlement is that we cannot divulge all of this information, which is one of the reasons the statistics on product liability are not very good. You really do not know all the problems, because they do not come in the proper statistical manner.

The NAM receives letters every day from companies that have similar stories to tell. A New Jersey company said that they were forced—they said, "We have been forced to watch our company's international competitiveness being undermined by the high cost of product liability and insurance. This forces a company like ours to withdraw products and abandon research and development for new ones. We are forced to watch our international competitors developing products we ourselves had hoped to manufacture and sell."

Let me give you one more, from a Colorado company supplying the U.S. Government. They say, "We are faced with a personal injury lawsuit filed by a user who did not follow instructions or use common sense when using the product. To minimize attorney's fees we settled the suit out of court. The injury sustained by the plaintiff was a few stitches in his arm."

Earlier this year, in a letter to Robert Rubin, assistant to the President for the National Economic Council, DuPont chairman Edgar Willard stated:

> DuPont is currently involved in more than 3,000 lawsuits in the United States, 1,100 of which are product liability cases.
>
> In Europe, where our sales in similar businesses were about 40 percent of those in the United States we have only 10 product liability cases, compared to about 1,100 in the United States. Moreover, the total expenditure in the European case is less than $1 million, whereas the United States is in the billions.

There is no question but that the excessive cost of litigation is putting U.S. businesses at a disadvantage competing in world markets. The financial burdens are severe enough that some companies are going without insurance, which puts the citizens at risk. Many of the NAM small companies "go bare," and acknowledge that one product liability suit would be the end of their business. The United States cannot afford to lose companies and jobs. Manufacturers and the public want an end to this situation.

In the interest of time, I will not go over the problems with health care—Senator Lieberman mentioned that—but this is serious. Even in our company we see it.

Revisions to bill S. 687, made in the 102d Congress, respond to criticisms from Congress and interest groups. The modest reforms to the bill can now truly be called proconsumer, with the adjustments to the alternative dispute resolution and expedited settlement provisions.

I would like to make one other comment about why I think a Federal bill is needed. The gentleman that spoke before made a very good point, and I am one brought up steeped in State's rights, except in product liability we manufacture products all over the United States, the raw materials for which come often from 4, 5, 6, 7 States, and the product is sold in the 50 States—very difficult to comply with 50 different sets of laws with 1 product. We are not that smart as engineers.

In addition to the proconsumer revisions that have already been mentioned, the key provisions of S. 687 would create a uniform and clear standard for imposing punitive damages, abolish joint liability for noneconomic damages—I repeat, noneconomic damages such as pain and suffering awards—establish a complete defense where a claimant using illegal drugs or alcohol is more than 50 percent responsible for the event, causing harm, set a reasonable time limit beyond which a manufacturer of capital goods used in the work place will not be sued for injuries caused by the product, and limit product seller liability to harm caused by their own fault.

S. 687 helps provide a level playing field for U.S. manufacturers and offers assurance to them that Congress is committed to restoring U.S. competitiveness by creating an atmosphere that encourages innovation. Instead of being sued for designing and building even safer, better products, American manufacturers will be encouraged to take these positive steps. We believe S. 687 is a significant and essential step in the right direction.

While it may not go far enough to restore balance in a legal system that is seriously misaligned, it is a good starting point. Absent the reform, the litigation crisis will escalate, and American con-

sumers will continue to pay the price as insurance and legal costs are passed on, and U.S. products disappear from the marketplace.

Let us not allow the innovation, quality, safety, and pride, the American hallmarks of American manufacturers, to be replaced by the decisions of lawyers and risk managers. Passing product liability reform will set the needed uniform standards that will benefit Americans who make and sell products.

Thank you for giving me this opportunity today.

[The prepared statement of Mr. Pritzker follows:]

PREPARED STATEMENT OF ROBERT PRITZKER

Good Morning, Mr. Chairman, distinguished members of the committee. My name is Bob Pritzker and I am president and CEO of the Marmon Group, a Chicago-based management service organization of more than 60 autonomous manufacturing and service companies worldwide. Together, they have annual sales of $4 billion and employ more than 27,000 persons. I am also the new incoming chairman of the National Association of Manufacturers and will formally assume that role in a couple of weeks.

I thank you for this opportunity to testify on the behalf of the NAM and manufacturers on an issue that is of paramount importance to me as an engineer and businessman and to the NAM as the representative of this country's manufacturers. The NAM's membership includes medium, large and 9,000 small manufacturing companies. It is worth noting that 80 percent of the NAM's members employ 500 or fewer employees. And it is well worth noting that it is primarily these smaller companies where job growth is occurring and where good jobs are being created.

I can think of no more important issue to inaugurate my tenure as NAM chairman than that of product liability reform. This is an issue that cuts across all sectors of the manufacturing industry and is having an increasingly harmful impact in each and every sector of our industry.

I come before you today to urge your support for S. 687, the Product Liability Reform Act. Passage of this measure would signal to American manufacturers of all sizes that Congress is serious about encouraging economic growth, enhancing the ability of American business to compete and creating jobs.

Before I continue, I wish to extend my warm thanks to Senators Rockefeller, Gorton, Lieberman and Dodd for their dedicated work in making this a bipartisan effort, aimed at securing much-needed reforms for our current system of product liability laws. With this kind of leadership, I feel certain that this Congress will enact the modest but essential reforms in S. 687.

I. IMPACT ON AMERICAN MANUFACTURERS

It is time to enact product liability reform. The impact of our current product liability law is a major concern for American manufacturers, touching all aspects of operations. For the smaller manufacturers, this impact is magnified. The 15-year evolution of this legislation has yielded a bill that provides to manufacturers some relief from overwhelming litigation and transaction costs while incorporating substantial consumer-protection provisions. Passage of S. 687 is critical to manufacturers, to business and to our economy. We firmly believe that the liability crisis does not stem from the fact that U.S. manufacturers produce shoddy products, while foreign manufacturers produce safer ones. Rather, foreign manufacturers are not subject to the same laws to the same degree we are. The U.S. product liability laws are seriously restricting American manufacturers' ability to compete in the international marketplace.

Under the current product liability system, substantial monetary and human resources are diverted from the number-one manufacturing objective: creating and producing goods. Simply put, this means that the more money spent on litigation, the fewer dollars there are for the vital activities of product development, innovation and actual production. Economic growth and job creation are hampered when year after year, significant resources are consumed by costly, and often questionable, products liability claims.

At first glance, one might ask, "What's the problem, when U.S. products are sold overseas, aren't they subject to foreign laws and when foreign products are sold here, aren't they subject to U.S. laws?" The answer to that question is yes, but a more thorough analysis yields some disturbing facts:

1. Liability costs in the United States are times greater than in Japan and times greater than in Europe. Imagine trying to compete when the price of one component

of your product so greatly exceeds that of your competitors. It doesn't require a degree in economics to know that a dollar spent for liability costs is a dollar not spent for research and development, production, employee benefits or new jobs.

2. One reason for this cost differential is that, like U.S. manufacturers, foreign manufacturers sell most of their products at home. Since liability costs per product are based on liability exposure, and exposure is so much less under the legal system of our competitors, U.S. manufacturers' liability costs are naturally higher than their competitors.

3. A U.S. product also receives more liability exposure, and consequently, more cost, because of manufacturer longevity in the market. While a Japanese product may have first been introduced in the U.S. marketplace in the 1960's, U.S. manufacturers must defend themselves against products that have been around a lot longer, and which they may not have even manufactured. And while other nations recognize that there should be a statute of repose that says, in essence, that once a product reaches a certain age, we presume it is not suffering from a design defect, U.S. manufacturers are responsible for their products forever. The European Community has addressed this concern by establishing a 10-year statute of repose for all products. S. 687 would establish a 25-year statute of repose for capital goods only, and only then if an injured employee could get workers compensation for his or her injury. This is the least we can do, especially when we consider that once the product leaves the factory, the manufacturer loses control of it, is not responsible for maintaining it or training the people who use, repair, abuse, or alter.

The NAM receives letters every day from companies that have decided to discontinue or forego new product lines due to "potential future risk." Specifically—

- From a New Jersey company: "We have been forced to watch our company's international competitiveness being undermined by the high cost of product liability litigation and insurance. This forces companies like ours to withdraw products and abandon research and development of new ones. We are forced to watch our international competitors developing the products we ourselves had hoped to manufacture and sell."
- From a Colorado company supplying the U.S. government: "We were faced with a personal injury law suit filed by a user who did not follow instructions or use common sense when using the product. To minimize attorneys' fees, we settled the suit out of court. The injury sustained by the plaintiff was a few stitches on his arm."
- From a Pennsylvania company: "We incur needless administrative and legal costs, both in staying abreast of the many different requirements in the jurisdictions in which we sell our products and in defending ourselves against what are often nuisance suits. For a small company like Autoclave, these extra administrative and legal expenses impose an extraordinary opportunity cost as well. We have one person, our treasurer/controller, who handles insurance, as one of many responsibilities. When a claim occurs, he must defer other projects and concentrate his efforts on the claim. Due to the nature of our business—high-pressure components—we are particularly prone to claims, despite our excellent quality and a very good record in terms of actual claim expense. Every day devoted to these claims represents, at best, a day's delay in completion of other projects, many of which have a direct impact on our profitability."

A 1992 Research Summary prepared by Arthur Wright and Associates entitled "Measuring the Impacts of Non-Uniform Product Liability Laws on the Cost of U.S. Goods" found that:

> * * * differing state laws on product liability are likely to increase total costs to a small firm and decrease its ability to recapture those costs through price increases. State differentials would also tend to increase litigation costs (through uncertainty of the law), increase the probability of lawsuits, and increase the expected award in the event of a lawsuit.

The financial burdens are severe enough that some companies are going without insurance. Many of the NAM's small companies that "go bare" acknowledge that one major product liability suit would be the end of their business. The United States cannot afford to lose companies and jobs to lawsuits. Manufacturers want an end to this situation.

II. S. 687

Revisions made in the 102nd Congress responded to criticisms from Congress and interest groups. The modest reforms of S. 687 can now truly be called pro-consumer, with the adjustments to the alternative dispute resolution and expedited settlement provisions.

In addition to the pro-consumer revisions that have already been mentioned, the key provisions of S. 687 would—

- create a uniform and tougher standard for imposing punitive damages;
- abolish joint and several liability for non-economic damages—I repeat, non-economic damages;
- establish a complete defense where a claimant using drugs or alcohol is more than 50 percent responsible for the event causing harm;
- set a reasonable time limit beyond which a manufacturer will not be sued for injuries caused by the product; and
- limit product seller liability to harm caused by their own fault.

It is worthwhile to note that the Reporter's Study of the American Law Institute, perhaps the most prestigious organization of legal thought, has recommended reforms to punitive damages that mirror those in S. 687.

CONCLUSION

In establishing uniform federal product liability law, S. 687 would provide a level playing field for U.S. manufacturers and offer assurance to them that Congress is committed to restoring U.S. competitiveness by creating an atmosphere that encourages innovation. Even the National Governors Association (NGA) recognizes the benefits of reform. Last year, they unanimously called on Congress to enact a uniform federal product liability law. NGA found the current system to cause inflated prices for our consumer goods, the discontinuation of necessary product lines, and adversely affects the international competitiveness of the United States.

Instead of being sued for designing and building even safer, better products, American manufacturers will be encouraged to take these positive steps. We believe S. 687 is a significant and essential step in the right direction. While it may not go far enough to restore balance to a legal system that is seriously misaligned, it is a good starting point. Absent reform, the litigation crisis will escalate and American consumers will continue to pay the price, as insurance and legal costs are passed on and U.S. products disappear from the marketplace. Let's not allow the innovation, quality, safety and pride that are the hallmarks of American manufacturers to be replaced by the decisions of lawyers and risk managers. Passing product liability reform would set the needed uniform standards that will benefit Americans who make, sell and use products.

Thank you for giving me this opportunity today.

Senator BRYAN. Thank you, Mr. Pritzker. I am sure there will be questions of you when we complete the presentations.

Ms. Nimmons, we will hear from you next. Good morning.

STATEMENT OF JULIE NIMMONS, CHIEF EXECUTIVE OFFICER, SCHUTT SPORTS GROUP

Ms. NIMMONS. Good morning, Mr. Chairman. Thank you for inviting me to appear today before the committee. My name is Julie Nimmons, and I am chief executive officer of Schutt Sports Group in Litchfield, IL.

Schutt and its affiliate companies manufacture a variety of high quality sports products in Illinois and Tennessee. We produce athletic equipment for football, baseball, and basketball, primarily helmets and faceguards and other protective gear, and also basketball goals and backboards. We are currently in the process of developing new lines of cross-training helmets.

Schutt is one of the last family owned and operated sporting goods companies in the country. The combined businesses of the Schutt Sports Group employ approximately 150 people and have annual sales of $20 million.

I welcome the opportunity to appear before this committee, because I can personally attest to the way in which product liability law threatens our company and the livelihoods of our employees. In 1970, there were 18 companies manufacturing football helmets in this country. Today there are only two: Schutt and Riddell, Inc. Well-known sporting companies such as Wilson, Spalding, and Rawlings no longer produce football helmets. The reason: product

liability costs. Soaring insurance premiums, exploding litigation expenses, and the threat of excessive judgments literally drove most manufacturers to cease production.

To make the point even clearer, many of the companies who left the business never suffered an adverse judgment. They simply made a business decision that an irrational legal system left their companies with an unreasonable liability exposure. They were faced with potentially huge costs which they could not control, regardless of the safety or quality of their products.

As one of the two remaining helmetmakers, my company is under constant threat from product liability litigation. If product liability meant defective or hazardous products, or negligence on the part of the manufacturer, I would have no problem. But I am here to tell you that product liability means something completely different. It means placing three warning labels on every helmet, one on the faceguard, warning statements on each catalog page or advertisement dealing with football that leaves our plants, yet still being sued for failure to warn.

It means being sued in cases where our company did not even manufacture the helmet, but only bought some assets of the original manufacturer. It means being forced to spends hundreds of thousands of dollars in legal fees and countless weeks of my time to "win"—a term I must put in quotes—to win lawsuits which are rarely based on the performance of the helmets we produce.

It means our employees hold their breath every time a case goes to jury, because a runaway award could mean the end of our company. Fortunately, we have successfully defended every multimillion dollar case we have faced, but it does not get any easier when the system is so unpredictable.

Clearly, product liability diverts potential investment resources. The money I am forced to devote to legal defense could be spent more productively elsewhere. Research and development, export promotion, and market research are three immediate areas which would help our company's competitive position and ultimately create jobs.

But, beyond that, I can tell you product liability stifles innovation. A couple of years ago, we designed a new baseball product. We mocked up the product and ran the prototype through the applicable standards testing. It produced great results. We were very excited about the innovation, but when we looked into full-scale production, we could not get anyone to supply us with the needed materials. Suppliers turned down our business just because they did not want the possibility of being linked to lawsuits.

Just this month, a potential supplier of a minor component part of a new fitting system for helmets we developed would not sell us the part. Why? Because we were going to use his product in an AIR liner for a helmet and his legal counsel advised him to turn down our business. The result is an additional unbudgeted expense of thousands of dollars in order for us to complete this project. This is a real problem.

How can a company such as ours, whose function is to produce protective equipment, develop new products if we are not assured of access to materials? It hurts all of us, business and consumers, to stifle innovation this way.

And, at the same time, product liability means problems with other vendors because we are too safe. What that means is the stringent quality assurance standards we developed to protect ourselves in lawsuits end up generating ill will with vendors who see our procedures as unnecessarily burdensome. I have been told by vendors many times that no one else has specifications like ours.

I came here today with a direct message. Product liability needs to be fixed. We need to put some reason into the law. It is out of kilter. It encourages lawsuits that do not help anyone. When we successfully defend a big suit, everyone loses. The plaintiffs lose, but we lose also. You cannot spend hundreds of thousands of dollars unproductively and not suffer. Our employees lose and our customers lose.

Often we get sued for one reason. Not because we produced a defective product. Not because we were negligent. But, rather, for the simple reason that we are perceived as having deep pockets, which represents the best chance for a big payoff. This has to be stopped.

I would be doing a disservice if I left the impression that product liability affects only helmet manufacturers. Liability concerns plague the entire sports industry. In a 1993 survey of Sporting Goods Manufacturers Association members, product liability reform ranked the first among 35 policy issues needing attention. Two-thirds of the responding companies ranked product liability reform as the highest or next-to-highest priority facing the industry.

What I have said this morning comes from personal experience of the liability excesses. But I can also tell you the problem is pervasive. Whether it is softball, exercise bikes, or a pogo stick, product manufacturers are seen as the insurers of last resort for sports activities. What that ultimately may mean is less access to sports, which would yet be another manifestation of the cost of product liability in our society.

Thank you for the opportunity to testify. I would be happy to answer any questions the committee may have.

[The prepared statement of Ms. Nimmons follows:]

PREPARED STATEMENT OF JULIE NIMMONS

Good Morning, Mr. Chairman. Thank you for inviting me to appear today before the Committee.

My name is Julie Nimmons and I am the Chief Executive officer of Schutt Sports Group in Litchfield, Illinois. Schutt and its subsidiary companies manufacture a variety of high quality sports products in Illinois and Tennessee. We produce athletic equipment for football, baseball and basketball, primarily helmets and faceguards and other protective gear and basketball goals and backboards. We are currently in the process of developing new lines of cross-training helmets.

Schutt is one of the last family owned and operated sporting goods companies in the country. The combined businesses of the Schutt Sports Group employ approximately 150 people and have annual sales of $20 million.

I welcome the opportunity to appear before this Committee because I can personally attest to the way in which product liability law threatens our company and the livelihoods of our employees. In 1970, there were at least 18 companies manufacturing football helmets in this country. Today there are only two: Schutt and Riddell, Inc. Well-known sporting goods companies such as Wilson, Spalding and Rawlings no longer produce football helmets. The reason: product liability costs. Soaring insurance premiums, exploding litigation expenses and the threat of excessive judgments literally drove most manufacturers to cease production.

To make the point even clearer, many of the companies who left the business never suffered an adverse judgment. They simply made a business decision that an irrational legal system left their companies with an unreasonable liability exposure.

They were faced with potentially huge costs which they could not control, regardless of the safety or quality of their products.

As one of the two remaining helmet makers, my company-is under constant threat from product liability litigation. If product liability meant defective or hazardous products, or negligence on the part of the manufacturer, I would have no problem. But I am here to tell you that product liability means something completely different. It means placing three warning labels on every helmet, another on the faceguard and warning statements on each catalog page or advertisement dealing with football, yet still being sued for "failure to warn". It means being sued in cases where our company did not even manufacture the helmet but only bought some assets of the original manufacturer. It means being forced to spend hundreds of thousands of dollars in legal fees and countless weeks of my time to "win"—a term I must put in quotes—to win lawsuits which are rarely based on the performance of the helmets we produce.

It means our employees hold their breath every time a case goes to the jury, because a runaway award could mean the end of our company. Fortunately, we have successfully defended every multimillion dollar case we've faced but it doesn't get any easier when the system is so unpredictable.

Clearly, product liability diverts potential investment resources. The money I am forced to devote to legal defense could be spent more productively elsewhere. Research and development, export promotion, and market research are three immediate areas which would help our company's competitive position and ultimately increase jobs.

But beyond that, I can tell you product liability stifles innovation. During a 1991 Senate Small Business Committee hearing, a witness from the Foster-Miller consulting firm testified that his company turned down contracts to supply materials to produce football and hockey helmets. His comment was that joint and several liability simply put his company at too much risk. I am sad to note this comes as no surprise.

A couple of years ago, we designed a new baseball product. We "mocked up" the product and ran the prototype through all the safety tests. it produced great results. We were very excited about the innovation. But when we looked into full scale production, we could not get anyone to supply us with the needed materials. Suppliers turned down our business just because they didn't want the possibility of being linked to lawsuits. Just this month, a potential supplier of a minor component part of a new fitting system for helmets we developed would not sell us the part. Why? Because we were going to use his product in an AIR liner for a helmet and his legal counsel advised him to turn down our business. The result is an additional, unbudgeted expense of dollars in order for us to complete this project. This is a real problem. How can a company such as ours, whose function is to produce protective equipment, develop new products if were not assured of access to materials? It hurts all of us, business and consumers, to stifle innovation this way.

And, at the same time, product liability means problems with other vendors because we are "too safe". What that means is the stringent quality assurance standards we developed to protect ourselves in lawsuits end up generating ill will with vendors who see our procedures as unnecessarily burdensome. I've been told by vendors many times that no one else has specifications like ours.

We feel we have to demand adherence to total quality control, but vendors accuse us of being unreasonable. We are a relatively small business, looking for state-of-the-art materials. We often deal with very large vendors, like GE or DuPont, to whom we represent a small piece of business. I cannot overstate the tightrope we are forced to wad. These are real life liability problems we face every day.

I come here today with a direct message. Product liability needs to be fixed. We need to put some reason into the law. It is out of kilter. It encourages lawsuits that don't help anyone. When we successfully defend a big suit, everyone loses. The plaintiffs lose but we lose also. You cannot spend hundreds of thousands of dollars unproductively and not suffer. Our employees lose. Our customers lose.

Often we get sued for one reason. Not because we produced a defective product. Not because we were negligent. But rather for the simple reason that we are perceived as having "deep pockets" which represents the best chance for a big payoff. This has to be stopped.

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What I have said this morning comes from personal experience of the liability excesses, but I can also tell you the problem is pervasive. Whether it's a softball, exercise bike or pogo stick, product manufacturers are seen as the insurers of last resort for sports activities. What that ultimately may mean is less access to sponsors, which would be yet another manifestation of the cost of product liability in our society.

Thank you for the opportunity to testify. I'd be happy to answer any questions the Committee may have.

Senator BRYAN. Thank you very much, Ms. Nimmons.

We will hear now from Professor Finley.

Good morning.

STATEMENT OF LUCINDA FINLEY, PROFESSOR, UNIVERSITY OF BUFFALO SCHOOL OF LAW

Ms. FINLEY. Thank you very much, Mr. Chairman.

I, too, like the other witnesses, greatly appreciate the opportunity to come speak with you today about product liability reform.

I appear before you as a professor who teaches tort law with a particular research emphasis on drugs and medical devices that have caused reproductive injury. And one particular focus of my research, consequently, is the impact of the tort system on women. And I will primarily address those issues in my remarks.

I would also like to say, however, that I come before you simply as a professor of law, who is interested in making sure that tort law is properly represented in what it does and does not do in the consideration that this body gives to whether it needs reform and, if so, what those reforms should be. I am here on behalf of no client, no constituency, no particular group.

Many of the points I address in my written testimony have been addressed by previous witnesses before this body or will be addressed by others. So, I will focus my brief opportunity for oral remarks on the points I wish to bring to your attention about the possible adverse impact on women's health from two particular provisions of S. 687; namely, section 203(b), which proposes to limit the circumstances under which punitive damages could be recovered when the FDA has previously approved a drug or medical device, and section 206, which proposes to eliminate joint liability for noneconomic or nonpecuniary loss damages.

On the punitive damages and the FDA issue first, it is an unfortunate truth that too many of the drug or medical device public health disasters that we have seen over the last several decades have involved products designed to be used in connection with women's body, often with reproduction. I am not sure that is mere coincidence, because, as you know, Congress is familiar with the issues hotly debated last year about the need for increased funding for research about women's medical problems and the need to get more women included in clinical trials on drugs. The tendency to overlook women and possible health impacts on them has been one that has been pervasive in the medical research and in testing of products.

So, several products, like the Dalkon Shield, the Copper 7 IUD, the drug DES, and the drug Ritadene, have been inadequately tested. And, based on the inadequate preliminary testing, in some of those instances, the FDA approved the product; in others, at the time, the Dalkon Shield, for example, under the law at the time,

did not require previous approval from the FDA. And in numerous of these instances of products intended to be used in connection with reproduction, after the approval and the marketing of these products, significant information about serious hazards from these products came to the companies' attention. And often the response was to do nothing, not to investigate, or to actively cover up the growing dangers.

I think one particularly telling example, which, when I share it with my tort students, they want to impose criminal liability for, is with the A.H. Robins Co. and the tragedy of the Dalkon Shield. Numerous reports from doctors inserting this IUD began to be received by the company of serious cramping, bleeding, perforation, and excruciating pain suffered by women upon insertion or use of the IUD. The company's response was to tell the doctors it must all be their fault. They must have been doing something wrong in putting in the device, even though their own research suggested this was a serious problem.

And then a few reports of the so-called male sensitivity problem, complaints of tickling with sex partners of women using the IUD were received at company headquarters. In response to that concern, they convened a special board meeting. That was an important problem, not the perforated uteruses they knew were being suffered by women.

I mean I think that is a particularly acute horror study. But the point is things like this happen too often when the subject of concern has been women's reproductive systems. And under the current proposal of section 203(b), many of these instances of postapproval knowledge of dangers and doing nothing, not informing the FDA, not informing doctors, not informing consumers, which I hope everyone would agree do constitute the sort of flagrant disregard for health and safety that is the punitive damages standard in section 203, would not entitle the victim to receive punitive damages under the current proposal to insulate a manufacturer simply because the FDA, because of inadequate information it received or inadequate resources, approved the product and has not been able swiftly itself to follow up on reports of dangers.

Now, I will turn to the joint liability and nonpecuniary loss damages issue.

Senator BRYAN. Professor Finley, let me interrupt for a moment. My colleagues have left because we have got a vote. I apologize. I am going to have to take off. So, we will be in recess and give you an opportunity to finish the balance of your comments when we get back.

Ms. FINLEY. Thank you very much, Mr. Chairman.

Senator BRYAN. The committee will stand in recess for 10 minutes. [A brief recess was taken.]

OPENING STATEMENT OF SENATOR HOLLINGS

The CHAIRMAN [presiding]. If the committee please, and Professor Finley, if you will excuse me, I would ask the recorder to record this beyond your and the panel's presentation. I am just trying to save the committee's time, pending Chairman Bryan's return from the vote. I am sorry I could not get here earlier for the simple reason that we had another hearing down there at Armed Services.

But right to the point, I was very impressed with an article on product liability in Japan and how the Japanese now are trying to move toward where the Europeans have moved with respect to strict liability. And lamenting about the deficiencies in the Japanese system, they say a typical uncomplicated civil case can take 5 to 10 years to be heard, a single product liability case can thus take as long as it has taken to reform product liability law.

So, we have heard in these hearings that competition is really what is at issue. American competitiveness, business, trade deficits, and all are being caused by our regularly established product liability statutes under the jurisdiction of torts and the States, and that what we ought to do is go the European way, and now the Europeans have gone our way. The Japanese are there, too. And we can well understand why, because it is just unconscionable to have these things occur and have no system which has proved more than necessary.

I know the panels that were working with the First Lady relative to malpractice, now the issue and interest, of course, is all in health care. And with respect to that, they did not get into it because the trial lawyers said no, it was a nonstarter or anything of that kind, they got into it because they looked at the studies in the worthwhile niche of product liability. And just a couple of weeks ago, I am quoting from the article on that particular score in Parade magazine, a 5-year study of malpractice in New York came up with disturbing findings.

A team of doctors, lawyers, economists, statisticians, headed by Dr. Howard H. Hyatt of the Harvard Medical School—and I am cutting it short—the researchers examined 31,000 medical records of patients discharged in 1984 from New York hospitals, then applied the results to all of the 2.6 million patients discharged that year.

They learned that medical treatment had injured close to 100,000 patients, inflicting disability or extending the time they spent in the hospital. Not all injuries caused in a hospital are due to negligence, but close to one-third of the cases studied, 27,000, showed patients hurt by the negligent acts of doctors, nurses, and others.

In all, 14,000 people died of injuries inflicted in the hospital, one-half of them because of negligence. In other words, their deaths could have been avoided.

I will eliminate some other comments I had so we can get back to the witnesses. Just in these past couple of weeks there was an article in the Wall Street Journal about an $11.3 million verdict. The other side will argue that this is a terrible thing, but I can tell you, as a trial lawyer, if you suffered the same injuries and deaths that was caused in this particular little squib, I would not be worth my salt if I could not get a similar verdict. It was not an egregious verdict. Listen to it.

A Federal court jury—Federal court—oh, we got to get away from these States and runaway juries as the proponents contend, but a Federal court jury took less than 3 hours to return an $11.3 million judgment against General Motors for a truck fire that killed a woman. Jurors decided Friday that gasoline spilling from a defective fuel pump caused the 1985 Chevrolet S–10 Blazer to explode

on February 23, 1990. They also ruled that the explosion and not a preceding head-on collision, killed Beverly Sue Garner.

The lawsuit filed against GM on behalf of Ms. Garner's two teenage sons claimed GM knew the fuel pump was defective. For the first time in a case against GM, jurors were shown a 1973 company report that estimated that, "For GM, it would be worth approximately $2.20 per new model auto to prevent a fuel-fed fire in all accidents."

GM attorneys declined to comment. They argued that the fires were caused by the fluids from the other car.

Here we are, 20 years after the *Pinto* case. If you did not have product liability, I can tell you here and now, we would be in a disaster situation on health costs, Senator Rockefeller, because of the simple reason that this really avoids—if we are talking about all the ways for savings, savings, savings, cut health costs—health care costs. If you really want to increase health costs, go on to these other rules that have been found spurious and go to the Japanese and the European systems as they move to ours.

Thank you, Mr. Chairman, now that we are back.

Senator BRYAN [presiding]. Thank you very much, Chairman Hollings.

This might be an appropriate time—I assured Professor Finley that she is going to have an opportunity to complete her statement, which we interrupted because of the vote—but this may be an appropriate time, since we are joined by two of our other colleagues here, to defer to them for any comments they might want to give.

Let me defer first to Senator Rockefeller, who is the prime sponsor of this bill, and then I will follow with Senator Mathews, if he has any comments.

OPENING STATEMENT OF SENATOR ROCKEFELLER

Senator ROCKEFELLER. Mr. Chairman, you are more than generous. I apologize to the witnesses but I actually really do want to give my statement because I think it is pretty good. So, will you forgive me? [Laughter.]

As my colleagues are aware, last September, 58 Senators went on record in favor of product liability legislation. Others expressed support for the legislation and the concept but raised questions about a few specific provisions in it. While the support was not enough to invoke cloture and thereby let the Senate vote, it was a clear sign that a majority of the Senate understood the need for product liability reform.

Now, S. 687 contains important changes which respond to a number of Senators' concerns about last year's bill. Once again, we have modified, modified it, modified it. Because of these changes, I am confident, Mr. Chairman, that even greater bipartisan support exists this year for the product liability legislation. Based on the level of support for this bill both in committee and the full Senate, Mr. Chairman, I would hope that S. 687 will be acted on long before the end of this session so it can be promptly reported to the full Senate before the end of this year. That is, I hope our committee will mark it up.

Product liability legislation is very familiar to this committee, and this one may be of interest to our witnesses: Since 1981, the

Commerce Committee has held 21 days of hearings on product liability reform and reported five product liability bills. Numerous witnesses on all sides of the issues have appeared and provided hundreds of hours of testimony. As a result, an evolutionary process has taken place, and I stress this because there are so many people who think the bill we have before us now is the bill that was before us 10 years ago, and it is a totally different—totally different bill. And we cannot seem to get that through.

In 1985, in fact, I voted against legislation then being considered because I thought it was skewed too much in favor of business. But sensible changes have been made over time to help consumers and promote fairness. Because of these changes I now strongly support this product liability legislation. Past hearings have made clear that product liability reform is needed to promote long-term economic growth, protect U.S. competitiveness, and encourage the development and marketing of innovative new products such as lifesaving drugs.

Numerous examples exist of safe and effective products which go unmarketed or have been withdrawn from the market because of liability concerns. Last July, for example, Abbott Laboratories announced that because of liability fears it was dropping plans for human trials of a drug to prevent HIV-infected mothers from transmitting that virus to their unborn children. Similar findings have been noted in studies conducted by the American Medical Association and the Brookings Institution, among others.

Now, the subcommittee has received a written statement for the record from James L. Vincent, chairman and chief executive officer of Biogen, Inc., a biopharmaceutical company based in Cambridge, MA. As its name suggests, Biogen is obviously principally engaged in developing and manufacturing drugs through genetic engineering. I want to indulge my colleagues, and I want to read a portion of Mr. Vincent's statement because I believe it is compelling and it points out the importance of our work on the product liability issue.

He says:

> Our shareholders take substantial financial risk by betting that we can overcome imposing scientific and regulatory hurdles. For instance, Biogen bet $60 million on what we believe to be an extremely AIDS drug. Regrettably, it just did not work. We take these risks and do not ask for a bailout. We are prepared to succeed or fail based on our estimates of the strength of our science and the size of our markets.
>
> I am not prepared to bet the future of Biogen on the random lottery of the American product liability system. I, myself, have made the strategic decision not to pursue the development of an AIDS vaccine in the current environment because I have made a business judgment that there is a significant likelihood that the courts would bankrupt the company by awarding large judgments to sympathetic plaintiffs, regardless of whether the vaccine actually caused the injury.

So we have a choice. We can change the system so that companies can evaluate the reasonable risks of product development or we can stick with the status quo. The cost of sticking with the status quo in the pharmaceutical industry is human life. We need a climate that will encourage the development of AIDS vaccines.

Now, many States have recognized the need for product liability reform. Already this year Texas, North Dakota, Mississippi, Arizona, have enacted significant liability reform legislation. While these individual States' efforts demonstrate very strong support for

reform, they do not and indeed cannot provide a uniform solution to what is truly and obviously a national problem. Over 70 percent of the goods manufactured in a State are sold outside the State—interstate—national problem. For this and for other reasons, the National Governors' Association, which I know to be an organization especially sensitive to States' rights based on my experience of being Governor of West Virginia for 8 years, has called, by vote, upon Congress to enact Federal uniform product liability law. The President, incidentally, when he was a Governor, voted twice for that, when he was a Governor.

Some have suggested that legislation helpful to business is, by definition, harmful to the consumers. You are either on one side or you are on the other side. There cannot be fairness. And in this case, of course, the public is consumers or victims. But fixing our broken system can be, and under S. 687 will be, a win-win proposition I honestly believe, Mr. Chairman, a victory for our Nation's businesses and for its consumers. Importantly, S. 687 will give consumers three principal advantages, I stress, three principal advantages over the current patchwork system, the 51 different product liability laws.

First, the bill contains a provision to encourage the use of State alternative dispute resolution mechanisms. This provision, which is completely nonbinding on plaintiffs and preserves a plaintiff's right to a jury trial, will help injured persons obtain recovery more quickly; this is good for the consumers.

Second, S. 687 contains a special expedited provision which will place a penalty of up to $50,000 on a defendant—not on the plaintiff but on the defendant—who declines an offer to settle where the plaintiff subsequently recovers more than the offer. This provision, like the ADR provision, will help injured persons obtain recovery more quickly. This is good for consumers.

Both of these changes were made since last year's bill, which got 58 votes, to respond to specific concerns of specific Senators.

Third and finally, S. 687 contains a liberal discovery rule statute of limitations which will open courthouse doors in many States to persons suffering latent injuries such as illnesses associated with asbestos. The provision preserves an injured person's right to bring suit until 2 years after he or she learns or should have known of both the harm and its cause. This is very good for consumers.

Clearly, and I conclude now Mr. Chairman—I thank you for your indulgence—S. 687 and its immediate predecessors came long before and are very separate from what I would call the Dan Quayle agenda, which I did not support, and this is not that kind of a bill. I will say it 100 times if I have to. Please read the bill. It has changed, it has evolved, it is new, it is fair. This bill will not create radical changes in product liability law. It contains no caps on compensatory damages, or attorney's fees for that matter. Rather, it contains sensible, realistic reforms which will apply uniformly in all the States.

That is it.

[The prepared statement of Senator Rockefeller follows:]

PREPARED STATEMENT OF SENATOR ROCKEFELLER

Mr. Chairman, thank you for scheduling this hearing on S. 687, the Product Liability Fairness Act. As my colleagues are aware, last September, 58 Senators went on record in favor of product liability legislation. Others expressed support for the concept, but raised questions about a few specific provisions. While the support was not enough to invoke cloture, it was a clear sign that a majority of the Senate understood the need for product liability reform.

S. 687 contains important changes which respond to a number of Senators' concerns about last year's bill. Because of these changes, I am confident that even greater bipartisan support exists this year for product liability legislation. Based on the level of support for this bill both in Committee and the full Senate, Mr. Chairman, I would hope that S. 687 will be acted on long before the end of this Session so that it can be promptly reported to the full Senate.

Product Liability legislation is very familiar to this Committee. Since 1981, the Commerce Committee has held 21 days of hearings on product liability reform and reported 5 product liability bills. Numerous witnesses on all sides of the issue have appeared and provided hundreds of hours of testimony. As a result, an evolutionary process has taken place. In 1985, I opposed the legislation then being considered because I thought that it was skewed too much in favor of business. But sensible changes have been made over time to help consumers and promote fairness. Because of these changes, I now strongly support this product liability legislation.

Past hearings have made clear that product liability reform is needed to promote long-term economic growth, protect U.S. competitiveness, and encourage the development and marketing of innovative new products such as lifesaving drugs. Numerous examples exist of safe and effective products which go unmarketed or have been withdrawn from the market because of liability concerns. Last July, for instance, Abbott Laboratories announced that, because of liability fears, it was dropping plans for human trials of a drug to prevent HIV-infected mothers from transmitting the virus to their unborn children. Similar findings have been noted in studies conducted by the American Medical Association and the Bookings Institution, among others.

The Subcommittee has received a written statement for the record from James. L. Vincent, Chairman and Chief Executive Officer of Biogen, Inc., a biopharmaceutical company based in Cambridge, Massachusetts. As its name suggests, Biogen is principally engaged in developing and manufacturing drugs through genetic engineering. I would like to read from portions of Mr. Vincent's statement because I believe it is compelling and points out the importance of our work on the product liability issue:

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> We take these risks and do not ask for a bailout * * * We are prepared to succeed or fail based on our estimates of the strength of our science and the size of our markets.
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> I am not prepared to bet the future of Biogen on the random lottery of the American product liability system. * * * I myself have made the strategic decision not to pursue the development of an AIDS vaccine in the current environment because I have made a business judgment that there is a significant likelihood that the courts would bankrupt the company by awarding large judgments to sympathetic plaintiffs regardless of whether the vaccine actually caused the injury.
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> You have a choice. You can change the system so that companies can evaluate the reasonable risks of product development or you can stick with the status quo. The cost of sticking with the status duo in the pharmaceutical industry is human life—we need a climate that will encourage the development of AIDS vaccines * * *

Many states have recognized the need for product liability reform. Already this year, Texas, North Dakota, Mississippi, and Arizona have enacted significant liability reform legislation. While these individual state efforts demonstrate strong support for reform, they do not, and indeed can not, provide a uniform solution to what is truly a national problem. On average, over 70 percent of the goods manufactured in a state are sold outside of the state. For this and other reasons, the National Governors Association, which I know to be an organization especially sensitive to states' rights based on my experience as Governor of West Virginia, has called upon Congress to enact a federal, uniform product liability law.

Some have suggested that legislation helpful to business is, by definition, harmful to the public—in this case to "consumers" and to "victims." But fixing our broken system can be, and under s.687 will be, a "win-win" proposition: a victory for our nation's businesses and for its consumers. Importantly, S. 687 will give consumers three principle advantages over the current patchwork system of 51 different product liability laws.

First, the bill contains a provision to encourage the use of state alternative dispute resolution (ADR) mechanisms. This provision, which is completely nonbinding on plaintiffs and preserves a plaintiff's right to a jury trial, will help injured persons obtain recovery more quickly. That is good for consumers.

Second,S. 687 contains a special expedited settlement provision which will place a penalty of up to $50,000 on a defendant who declines an offer to settle where the plaintiff subsequently recovers more than the offer. This provision, like the ADR provision, will help injured persons obtain recovery more quickly. That is good for consumers.

Both of these changes were made since last year's bill to respond to specific concerns of some Senators.

Third, S. 687 contains a liberal "discovery rule" statute of limitations which will open courthouse doors in many states to persons suffering latent injuries such as illnesses associated with asbestos. The provision preserves an injured person's right to bring suit until two years after he or she learns or should have known of both the harm and its cause. That is good for consumers.

Clearly, S. 687 and its immediate predecessors came long before and are separate from the "Dan Quayle agenda", which I did not support. This bill will not create radical changes in product liability law; it contains no caps on compensatory damages or attorney's fees. Rather, it contains sensible, realistic reforms which will apply uniformly in all the states.

I hope that the witnesses today will shed some new perspectives on the product liability issue. I look forward to working with the leadership of the Committee and my colleagues on both sides as we move toward a prompt mark-up, and consideration by the full Senate. In closing, I would like to read a sentence from a letter I recently received: "The bill in its present form is in my opinion reasonable and therefore not something consumer advocates, including trial lawyers, ought to oppose." While the views expressed by this sentence are not novel and, in fact, are ones that I share, the reason I close with this sentence is because it was contained in a letter written to me by a member of a trial lawyers' association. Let me reemphasize that this bill has undergone enormous changes over the years. I hope that the witnesses today will talk about the bill that is before us now and not other incarnations of product liability legislation.

The CHAIRMAN. Mr. Chairman.

Senator BRYAN. Senator Hollings has asked for an opportunity to respond, and then I will call on briefly Senator McCain and Senator Mathews.

The CHAIRMAN. Very good. And my apologies to the panel, but I believe in the people of West Virginia. I believe in their good judgment. And since we are talking about excessive verdicts and runaway juries and cost to business, we never seem to want to mention the real cost.

I will never forget one case we had of *Pennzoil* v. *Texaco* down in Texas of $12 billion. That was more than all the product liability verdicts combined—so it is interesting to me that we find that product liability is a national crisis, a national need for national legislation, but never want to talk about the real verdicts that are brought by business against business.

In the recent case of *TXO Production* v. *Alliance Resources* down in West Virginia, and this is the latter part of June, just about 8 weeks ago, the U.S. Supreme Court upheld that verdict whereby they tried to—TXO tried to really snooker Alliance after they signed for the oil rights. And we all know about oil and drilling and everything, and we have got to have not the injured parties as a result of product liability but the injured parties as a result of oil drilling.

Here we go here now in West Virginia. The court and the jury down there gave Alliance a $19,000 verdict in actual damages and $10 million in punitive damages, and it went up before the U.S. Supreme Court, and the court in a 6–3 decision joined in concurring opinions by Justice Scalia and Thomas. They rejected TXO's claim and upheld West Virginia. We are making progress.

Senator ROCKEFELLER. I have no complaint with that, and that is one reason we have no caps on punitive damages and no possible way that anybody can be precluded from going to a jury trial.

Senator BRYAN. I thank my colleagues for their comments. [Laughter.]

I think Senator Mathews was here first and then I will yield to Senator McCain. Senator Mathews.

OPENING STATEMENT OF SENATOR MATHEWS

Senator MATHEWS. Thank you, Mr. Chairman. I have no opening statement. I do not know of any issue that has divided our State and some of the people that I am talking with from time to time as much as this one has. I am here to learn because there are serious problems that need to be addressed some way, and I want to find out how.

Thank you.

Senator BRYAN. Thank you, very much Senator Mathews. Senator McCain.

OPENING STATEMENT OF SENATOR McCAIN

Senator MCCAIN. Thank you, Mr. Chairman. I will be very brief. Maybe we could continue the debate between Senator Rockefeller and Senator Hollings here. That would be of interest. But I know the witness' time is very valuable, too, and I want to thank all the witnesses, both who are testifying for and against this bill.

I would also like to express my appreciation to Senator Rockefeller, who has been fighting this battle for many years now, and I am sorry to say I have gone a little cynical over the years as to its chances for passage. We always seem to be on the verge. But I applaud and appreciate his continued efforts on behalf of this much-needed reform.

Mr. Chairman, I will not take much time. I just want to mention one example, and that is the general aviation industry in America. It has basically been decimated. There is no general aviation industry in America, as far as piston engine aircraft are concerned. And we have seen literally the disappearance of an industry because of that or because of the product liability issue. I think we have to restore some balance. I believe that Senator Rockefeller's bill does restore balance, and as he said, it does not in my view restrict the rights of plaintiffs to seek equal justice under the law.

And I thank you, Mr. Chairman. I do thank you for holding this hearing, as well.

Senator BRYAN. Thank you very much, Senator McCain. And, Professor Finley, redeeming the commitment I made to you, we will hear from you for the balance of your testimony and your full statement is a part of the record, but I know I interrupted you midway through your oral presentation.

Ms. FINLEY. Thank you very much. It was an interesting and important discussion that you interrupted me for. And I would like to say I basically agree with Senator Rockefeller that this bill has been changed over the years, particularly from last year to this year, in very significant ways. That was one of the first things that struck me when I read the latest committee print and in particular I think some possible serious seventh amendment jury trial right problems with last year's version of the alternative dispute resolution procedures have been eliminated.

I would like to return briefly to the punitive damages in the pharmaceutical industry issue. And Senator Rockefeller mentioned the Abbott Laboratory's announcement that they are not doing clinical trials of a drug that could possibly prevent the transmission of HIV from pregnant women to their fetuses because of fears about product liability. Now, as law professors are wont to do, let me spin out a hypothetical here.

Suppose that Abbott did clinical trials and things looked promising and the FDA approved the drug. Under the current version of 203(b), assuming Abbott did not falsify or give misleading information to the FDA, that would insulate them from punitive damage. But now, let us suppose after the FDA approval, based on reports from additional clinical trials or from actual use, reports started coming in to Abbott that something they had not even bothered to look into in the initial clinical trials—namely, risk of miscarriage—was happening, and that women taking this drug were having a drastically increased incidence of miscarriage.

And let us suppose Abbott, upon receiving that information, said "Cover it up. Stifle it. God forbid, we cannot let this get out. It will reduce our sales." And the FDA did not learn about it, the doctors did not learn about it, and the women who ought to be given the choice whether to take the risk of miscarriage and the possibly way the risk of the miscarriage versus the approximately 30-percent risk of transmitting HIV to their child, a horrible choice to be faced with but one they should be entitled to make, are not told about it, either.

I would hope that most of you would agree that learning of a serious danger and not doing anything to inform the regulatory agencies, doctors, or the consuming public about it is a serious disregard of safety. If such a scenario were to develop under the current version of the bill, Abbott would not be faced with the possibility of punitive damages. But is that not exactly the sort of thing that the court system has been designed to deter, and that we would like to keep deterring?

Now I want to turn to the point where I had left off, the several liability for noneconomic loss. I think, like many previous versions of this provision, the current bill is still based on a misunderstanding about what joint liability really is. I know often the justification given for the need to make alterations in the doctrine of joint and several liability is the proposition that under joint liability someone could be held responsible for damage they did not cause but someone else really caused. That is wrong. That is not what joint liability means.

In order to have joint liability, several liability, any liability, a manufacturer or a seller, whomever, has to be found to have en-

gaged in wrongful conduct, and that wrongful conduct itself has to have caused the injury. Now, causation in some States means it is a substantial factor. In other States it means a but-for factor. This bill would leave that variation in place. So that all that joint liability is is an allocation between wrongdoers whose conduct has been found to have caused an injury—not caused 10 percent of it or 20 percent of it but caused the whole indivisible injury—to have to share how they allocate the damages amongst themselves.

What joint liability essentially does is it shifts the burden of possible noncollectability of some portion of the damages from the wrongfully injured person to an adjudged wrongdoer. So, whether it is tinkering around solely with several joint liability for noneconomic loss damages or for any kind of damages, I seriously question the need to tamper with a doctrine that has been seriously misrepresented in many of the States that have altered it or in many previous versions of this hearing before this committee and others.

Now, turning to the particular kind of damages that the current version of the bill chooses to tinker around with joint liability for; namely, noneconomic or nonpecuniary loss damages, I suspect that the focus on this sort of damages perhaps stems from an assumption that they are perhaps not as serious or important as economic loss damages. Or as the definitional section mentions, that they are somehow more subjective than economic loss damages.

On the issue of subjectivity, understanding that that partly is individual variation from one victim to another, economic loss, of course, is equally subjective using that definition of subjectivity. If you use the definition of subjectivity that noneconomic loss is more subjective because you cannot match it to a marketplace price like a wage rate or a medical bill, that suggests possibly that some of the things we value the most highly, the things that are most priceless in our life like our ability to have children or our ability to engage in intimate relationships, do not perhaps thankfully have ready marketplace values. But does that make them any less important and does that make their subjectivity something to be feared and shied away from.

I suggest not. And therefore, a lot of my testimony written statement is aimed at giving some examples of why noneconomic loss damages are tremendously important. And one other aspect of my testimony about noneconomic loss damages is that they are particularly an important fount of damages for women. Going back to the focus of my research on reproductive injuries, whether a reproductive injury is suffered by a man or a woman, and unfortunately there are products that can cause such injuries in both genders, the nature of such injuries is that the primarily incur noneconomic loss.

Consider the situation of a woman rendered infertile by the Copper Seven or the Dalkon Shield or DES. Her inability to have a child is, I hope we would all agree, a very serious and devastating injury not just to herself but to other loved ones. And yet it has very little economic wage loss impact in her life. Indeed, given the absence of maternity policies at some companies, it ironically may enhance her career that she cannot have a child. So, her economic loss is going to be very minimal.

Most of an injury like that is going to be put into the noneconomic loss category. So, what section 206 is now doing is saying to that woman, if the conduct of two companies happens to combine to equally cause your infertility, and one of them is bankrupt or out of business and the other one you will not be able to collect the full amount of your injury for that very important injury from the other company who a jury found wrongfully caused all of your injury, I suggest that you think seriously about that problem and say is that really wise social policy from the perspective of balancing the injured victim against the adjudged wrongdoer.

And I will conclude my prepared remarks with that. Thank you for the additional opportunity.

[The prepared statement of Ms. Finley follows:]

PREPARED STATEMENT OF LUCINDA M. FINLEY

Mr. Chairman, and members of the Subcommittee, I thank you for the opportunity to present my views on S. 687, the Product Liability Fairness Act. I am professor Lucinda Finley, a Professor of Law at the State University of New York at Buffalo School of Law. My teaching and research areas include tort law and toxic torts. I am a past Chair of the Torts and Compensation Systems Section of the Association of American Law Schools, and am currently working in a Tort Law casebook. In particular, my research has concentrated on the impact of damages recovery provisions on women, and on pharmaceutical products and medical devices that cause reproductive injuries. Drawing on my research, I would like to address two aspects of S. 687: a) Section 203(b), concerning proposed limitations on punitive damages for drugs and medical devices approved by the Food and Drug Administration; and b) Section 206, proposing to eliminate joint liability for noneconomic loss damages.

Before turning to these specific provisions, I would like to offer some general observations on S. 687. Given the multistate distribution of most products, I agree that uniformity in products liability substantive rules is both efficient and desirable. I question, however, whether federal legislation is really necessary to achieve that goal, because there is little substantive variation among the states regarding the basic criteria for imposing liability. And, since section 5 of S. 687 leaves non-diversity cases in state courts, there will remain just as much room for varying state court interpretations as currently exists. There are several aspects of S. 687 that bay actually create more litigation and multiply legal costs for both manufacturers and injured plaintiffs. For example, there will be litigation generated by Section 102 to determine whether a refusal to proceed pursuant to alternative dispute resolution was "in good faith." There will be litigation generated by Section 203(d) to determine whether particular evidence is or is not relevant only to punitive damages. Additional litigation will also be generated by the need to determine, in accordance with section 206, a percentage of responsibility for noneconomic loss. The vague standard in section 206 will also generate litigation and conflicting decisions over whether a "percentage of responsibility" means an allocation of causal responsibility, an allocation of fault or moral blame instead requires a perhaps physically impossible attempt to divide a plaintiff's indivisible injury.

Indeed, when I apply a litigator's mindset to this bill, I can see numerous provisions and ambiguities that will generate a great deal of additional proceedings and appeals. Lawyers may in fact be the primary beneficiaries of this bill, and defense interests, who already pay often exorbitant hourly rates to lawyers, may be left repeating the old adage "be careful what you wish for, you may just get it."

This concern about injecting new confusion and ambiguity and legal costs into products liability leads me to urge that before you support federalizing and changing products liability law, you hold the proponents of such change to the burden of proof they seek to impose on injured claimants seeking punitive damages: such proponents should demonstrate, by clear and convincing evidence, and not by fear, innuendo, and overdramatized anecdote, that the existing products liability system really is broken and in need of fixing that cannot be provided by state courts and state legislatures.

SECTION 203(b): LIMITATIONS ON PUNITIVE DAMAGES FOR DRUGS OR MEDICAL DEVICES

A. Proposals to Limit Punitive Damages Are Based on Fears Refuted by Empirical Evidence

As this Committee is well aware, the subject of punitive damages in product liability cases has generated a vast amount of heat from manufacturing interests. what light has been shed on the subject, however, from more disinterested sources such as academic researchers,[1] the GAO,[2] and the ABA,[3] reaches conclusions telling for their essential agreement:

- Apart from asbestos cases, in other products liability cases, including drug and medical device cases, the frequency of punitive damages awards since 1980 is decreasing.[4]
- The impression that punitive damages are routinely awarded in huge amounts that bear no relationship to compensatory awards is a false one, fueled by the tendency of the media and the business community to feature a few mega-awards, without mentioning that those awards are often reduced later by the trial court or an appellate court. when punitive damages awards since 1965 are controlled for inflation, there has been little change in the median size of awards, and the ratio of awards is only slightly more than the amount of compensatory damages.
- The overwhelming majority of plaintiffs who received punitive damages suffered catastrophic injury or death.
- When punitive damages are imposed, they are attributable to severe manufacturer misconduct that constitutes flagrant disregard of safety. Three out of four product liability punitive damages awards involve failure to warn of well-known dangers, or the failure to remedy, after marketing or regulatory approval, known serious dangers. In most of these cases high corporate management had knowledge of the health hazards and made conscious decisions to do nothing to improve safety or actively to suppress information of the hazards or to falsify data.[5]

In light of the mounting empirical evidence that punitive damages awards are not increasing, and are awarded only in instances of flagrant disregard for safety, proponents of cutting back on the circumstances or the types of products for which punitive damages can be awarded have a heavy burden, They must be able to answer satisfactorily the following question: why should a manufacturer of a drug or medical device that has falsified test data, or failed to test in the face of mounting reports of problems, or failed to add simple warnings in the face of mounting evidence of serious health hazards, or failed to withdraw a known and serious health hazard from the market, or failed to take simple and relatively inexpensive remedial measures, such as changing the tail string on an intrauterine device, be insulated from punitive damages? To those who answer, "because that manufacturer might not introduce potentially useful new products for fear of more punitive awards," the members of Congress, as responsible makers of public policy, must carefully examine the integrity of such claims.[6] The members of this body should also ask anyone who makes such a claim to dispassionately examine the empirical evidence and reassess the reasonableness of the professed fear. The empirical data about the frequency, amount and circumstances of punitive damages awards in products liability cases in general, and drug or medical device cases in particular speaks clearly to the fears

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[1] See Michael Rustad, In Defense of punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data, 78 Iowa L. Rev. 1 (1992); Thomas Koenig and Michael Rustad, Demystifying Punitive Damages in Product Liability Cases: A Survey of a Quarter Century of Verdicts (Roscoe Pound Foundation, 1991); S. Daniels and J. Martin, Myth and Reality in Punitive Damages, 75 Minn. L. Rev. 1 (1990) (authors are researchers at American Bar Foundation); Peterson, Sharma & Stanley, Punitive Damages: Empirical Findings (Rand Inst. for Civil Justice, Report R-3311-1CJ).

[2] GAO, Product Liability: Verdicts and Case Resolution in Five States (Sept. 1989).

[3] Report of the Special ABA Committee on Punitive Damages: A Constructive Examination (ABA 1986).

[4] Only 15 percent of the punitive damage awards in all the products liability cases studied by Professor Rustad came in cases involving drugs or medical devices. Rustad, In Defense of Punitive Damages, 78 Iowa L. Rev. 1, 47 (1992).

[5] See Rustad, 78 Iowa L. Rev. at 66, 67-75.

[6] An example of the need to greet claims that punitive damages are discouraging the introduction of safe and useful new products with a healthy degree of skepticism is provided by testimony that Peter Huber, the well known author and critic of the tort system, gave to this Committee in 1990 Huber claimed that Monsanto refused to bring to market a safe asbestos substitute because of fears of the liability system. Hearings on S. 1400 before the Consumer subcommittee of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 2d Sess. 340 (1990). What Huber failed to reveal, however, is that test animals infected with this supposedly safe product developed sarcomas, and that Monsanto's claim that this was of little or no relevance to likely effects in humans was refuted by some eminent scientists and public health experts. See Rustad, supra, 78 Iowa L. Rev. at 7879, n. 345.

of the potential innovator: if your company displays the basic level of regard for public health and safety that it claims it indeed has, and that fortunately many manufacturers do indeed have, and does not commit fraud, falsify data, utterly fail to engage in minimally scientifically adequate tests, cover up mounting evidence of safety hazards and serious injuries, or put profit concerns ahead of safety by taking no remedial or warning action in the face of mounting and compelling evidence of serious injuries, then your company does not have any reasonable fears of punitive damages awards.

B. The Proposal to Cut Off Punitive Damages in Most Instances of FDA Approval Eliminates an Important Safety Valve When Regulatory Oversight is Too Slow or Fails

while several of the instances in which punitive damages have been awarded in drug or medical device cases would still warrant punitive damages under section 203(b) of S. 687—withholding information from or misrepresenting information to the FDA—there are still several important areas of concern that this subcommittee, concerned as I'm sure it is about health and safety and gender equity in addition to the business climate for manufacturing should seriously consider.

The first concern is whether the FDA, strapped for investigatory and enforcement resources and lacking staff to do its own scientific investigations, is always an effective, prompt, or adequate regulator. One reason for the traditional tort rule that regulatory approval does not preempt tort liability is the recognition that regulatory agencies may themselves not always be the most effective guarantors of public safety, and that tort liability can serve as an important check, or additional safety valve, when the regulatory agency is strapped for resources, overwhelmed with other matters or too slow to respond because of political pressure from industry. For example, with breast implant devices, for years evidence gleaned from company documents through the discovery process in lawsuits mounted that the manufacturers were aware that the implants could leak and rupture and the silicone leakage in women's bodies could have serious adverse health effects. Yet it was almost nine years after the first punitive damages verdict—a verdict imposed because of the company's conscious failure to warn physicians or women of the known dangers and its misrepresentation of the product's safety in package inserts and promotional literature—before the FDA convened an investigation of these devices.

In the case of the Dalkon Shield intrauterine device, the FDA in 1974 initially asked A.H. Robins Co. to suspend marketing until the agency could review serious questions about the device's safety, but six months later the FDA allowed marketing to resume so long as shields were registered and adverse effects were reported. Then, despite accumulating evidence of serious, sometimes fatal infections, septic abortions, perforated uteruses, and infertility, neither the FDA nor the manufacturer took any remedial action A.H. Robins did not warn physicians, nor did it recall the product. Instead, the company issued press releases saying there was no reason for current users to have the device removed. It was not until ten years later, when, in 1984, some large punitive damages awards were issued by juries, and a federal judge strongly urged the company to contact doctors and women and remedy the danger, that the manufacturer offered to remove this deadly product from women's bodies.[7]

Another recent episode of mounting injury, a known danger, and regulatory inaction is provided by the Bjork-Shiley heart valves. The FDA approved the valves despite strong evidence of frequent breakage during clinical trials. Ten years after the FDA approval, the manufacturer had reported to the agency 248 deaths resulting from the predictable fractures of the valves. Still the FDA did nothing. This alarming situation prompted an investigation and scathing critique of the FDA by the House of Representatives Subcommittee of Oversight and Investigations of the Committee on Energy and Commerce. The report concluded that the FDA failed to heed its own staff's reports and warnings, failed actively to monitor the manufacturer and was lax in requiring it to submit information, abdicated the role of getting risk information out to doctors and patients to the manufacturer, and failed to monitor or require corrections in the misleading information distributed by the manufacturer. Staff Report, "Earn as You Learn: Shiley Inc.'s Breach of the Honor System and FDA's Failure in Medical Device Regulation," Staff Report No. 26-766, Subcommittee on Oversight and Investigations of the Comm. on Energy and Commerce, U.S. House of Representatives (February 1990).

While there are certainly commendable instances in which the FDA has acted swiftly to prevent dangerous drugs or devices from injuring U.S. consumers, much

[7] See, e.g., Tetuan v. A.H. Robins, 241 Kan. 441, 738 P.2d 1210 (1987); Richard B. Sobol, Bending the Law 10-22 (1991).

as the FDA's refusal to cave in to intense manufacturer pressure and approve thalidomide for use during pregnancy in the U.S.,[8] the instances recounted above, as well as others, should illustrate the wisdom of the traditional tort approach of not automatically allowing regulatory approval to insulate manufacturers from liability for their flagrant misconduct. When the regulatory agency has proven inadequate to monitor, prevent, or correct the health threat caused by known dangers, then why should the manufacturer that has continued to market or failed to correct the dangerous drug or device be insulated from punitive damages? Why should the people injured by the continued use of the dangerous drug or device bear the burden of both the manufacturer's flagrant misconduct and the FDA's inadequacies or limited resources? Why should society be deprived of the fall back deterrent protection of punitive damages awards, which in several instances have finally been what has prompted adequate remedial action?

C. The Proposal to Curtail Punitive Damages When the FDA Has Approved a Drug or Device Presents Particularly Grave Risks to Women's Health

It is neither accidental nor coincidental that several of the instances of regulatory failure and flagrant corporate disregard for health and safety mentioned above concern products intended to be used in women's bodies or in connection with women's reproductive systems. Too many of the most tragic and preventable instances of unsafe drugs or devices have involved women's reproductive health: D.E.S., which some have called one of the greatest public health disasters of the 20th century; the Dalkon Shield; the Copper-7; Rely Tampons; Accutane; Ritodine[9]; breast implants. There may be others predictably looming on the horizon. Many of the widely used infertility drugs, for example, despite warnings from the medical profession for the need for such testing, have not been adequately tested for possible adverse effects on any children conceived while using them, nor have they been tested for any extra health risks they may present to women already hormonally at risk because of their DES exposure, even though DES daughters are one of the largest consuming groups for infertility treatment.

Research has indicated that in several of these instances, manufacturers have been particularly lax about testing or about heeding signs of dangers or issuing warnings because women and women's health are devalued.[10] For example, in the case of the Dalkon Shield, corporate officials took no action when faced with reports from doctors that the device was causing women extreme pain, cramping, and heavy bleeding. when the company received a few reports of male sex partners' complaints that the tail string caused some minor sensitivity during intercourse, however, they ordered corrective action which actually made the risk of infection to women even greater.[11] As indicated by the recent struggles to obtain more funding for research into women's health problems such as breast cancer, and to get women included in drug research and clinical trials, governmental entities also have unfortunately not always accorded women's health a high priority.

Thus for women, the tort system serves as an especially important back up or check for the sorts of invisibility or conscious neglect they sometimes suffer from medical product manufacturers or government agencies. The deterrent impact of punitive damages is sometimes all that women have to send a message to manufacturers that they must take women's health seriously and fully investigate immediate and long term risks, especially reproductive risks. In the case of several of the drugs or devices most dangerous to women's health, punitive damages have served as the necessary device for finally persuading manufacturers to take remedial action with deadly products like the Dalkon Shield or in finally prompting the FDA to take action for dangerous products like breast implant devices.

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[8] See, e.g., Richard McFayden, "Thalidomide in America: A Brush with Tragedy," 11 Clio Medica 79 (1976).

[9] Ritodine is a drug approved by the FDA to prevent premature labor, and it is the most widely prescribed drug for that purpose. Just last year, a major study published in the New England Journal of Medicine revealed that extensive tests showed the drug to be ineffective, with high risks of serious adverse health effects, and sometimes fatal to women. This study was more thorough and methodologically sound than the inadequate testing on which the FDA based its approval. See G Kolata, "Drug to Aid Birth is Found Ineffective and Risky," N.Y. Times, July 30, 1992 at A1. I am not yet aware of any FDA action to respond to this alarming new evidence of ineffectiveness or danger, although the drug is still being marketed and prescribed.

[10] See, e.g., D. Scully, Men Who Control Women's health (Houghton Mifflin 1980); G. Correa, The Hidden Malpractice: How American Medicine Mistreats Women (Harper & Row updated ed. 1g85); C. Muller, Health Care and Gender (Russell Sage 1990); R. Meyer, The Bitter Pill (Seaview Putnam 1983); D. Dutton, Worse Than the Disease: Pitfalls of Medical Progress (Cambridge Univ. Press 1988); M. Mintz, At Any Cost (Pantheon 1985); N. Miller, The Politics of Contraception (Ohio St. Univ. Press 1993).

[11] Mintz, supra; Dawson and Perry, Nightmare (Macmillan 1985).

For these reasons, punitive damages for flagrant disregard of health and safety in the context of drugs and medical devices are an important part of the overall scheme for protecting women's reproductive health. Thus, section 203(b), which would eliminate the threat of punitive damages in most instances when the FDA had approved a drug or device or had failed to act to suspend its approval, undermines protection of women's health. I hope that this committee will conclude that women and their reproductive health are important enough to warrant leaving in place the deterrent role of punitive damages carefully developed by decades of tort law.

D. Section 203 Would Not Allow Punitive Damages in Several Important Instances of Serious Manufacturer Misconduct

In cases dealing with drugs or medical devices, there are several situations which have warranted punitive damages that would go unpunished and undeterred under section 203 as currently drafted. For example, in the case of the Copper-7 intrauterine device, after FDA approval, the manufacturer became aware of reports of serious health problems suffered by women using the device. G.D. Searle failed to follow up on these reports, failed to conduct further testing, and engaged in an active advertising campaign designed to assuage any concerns doctors might have due to these adverse experiences. The advertising campaign was also designed to encourage doctors to use the device on precisely the group of women most at risk of serious or fatal infection or sterility.[12]

In the case of the Dalkon Shield and the Copper-7, while the FDA did nothing and the reports of dangers continued to accumulate, the manufacturers also undertook no additional warnings or remedial action such as efforts to get women to have the deadly devices removed. Similarly, in the case of breast implants, while the FDA did nothing in the face of mounting evidence of serious health risks and product failure, some manufacturers continued to sell and aggressively market the product and made no effort to provide warnings about the growing evidence of dangers.

In other instances, while the FDA has approved a drug or device and issued guidelines for its marketing and the necessary warnings, manufacturers have knowingly failed to comply with the FDA guidelines and failed to provide the mandated warnings.[13]

Section 203(b) as currently drafted would not appear to allow punitive damages in these situations. For example, while it mentions withholding information from or misrepresenting data to the FDA, the bill says nothing about failure to comply with FDA guidelines or about callous inaction in the face of knowledge of danger or misrepresentation in advertising or information sent to physicians. Isn't this the sort of conduct that society wishes to deter and punish? why should drug and medical device manufacturers who engage in this sort of gross disregard for human health and safety be insulated from punitive damages, when manufacturers of other sorts of products who show similar contempt for health and safety are appropriately punished?

COMMENTS ON SECTION 206—SEVERAL LIABILITY FOR NONECONOMIC LOSS

Section 206 proposes to make liability for noneconomic, or nonpecuniary loss damages several only, rather than applying the traditional tort rule that liability for all loss caused by the wrongful and injurious conduct is joint and several. This section seems to be based on two assumptions, one of which is simply wrong, and the other of which is problematic from the perspective of social policy, especially with regard to the gender equity of the tort system.

A. Joint Liability Does Not Make Tortfeasors Responsible for Paying for Loss They Did Not Cause

The first assumption that apparently underlies section 206 is that joint liability means that a tortfeasor can be forced to pay for harm that their actions did not cause. This assumption, however is erroneous It represents a complete misunderstanding or misrepresentation of tort law. Before tort liability can be imposed, the trier of fact must find that the defendant engaged in wrongful conduct and that the conduct caused the plaintiff's injury. When there are joint tortfeasors, liability can only be imposed on each of them if the trier of fact finds that each of them engaged in wrongful conduct that caused the harm. Thus, each joint tortfeasor is liable be-

[12] See, e.g., Kociemba v. G.D. Searle & Co., 707 F. Supp. 1317 (D. Minn. 1989).

[13] See, e.g., Batteast v. Wyeth Laboratories, Inc., 526 N.E.2d 428 (Ill. App. 1988) ($13 million in punitive damages assessed for intentional failure to provide warnings mandated by FDA about serious dangers, such as coma or death, of aminophylline suppositories for infants and small children).

cause their actions caused all of the plaintiff's injuries—without, or but for the tortious conduct, the plaintiff would not have been injured.[14] Joint liability does not mean that part of the injury was caused by the Independent actions of one defendant, and some other part of the injury was caused by the independent actions of the other defendant. In most instances of injury, the victim's injuries are an indivisible whole, that cannot meaningfully be carved up into pieces attributable to different actors.[15] For example, when a defective IUD causes a woman to become sterile, one cannot meaningfully say that the failure of the tail string manufacturer to test the string caused half the infertility and the failure of the manufacturer of the whole device to test the tail string and the copper used in the body of the device caused the other half of the infertility. When a jury assesses comparative fault or comparative responsibility, it is attempting to assess the relative responsibility or culpability of the defendants vis a vis each other, and not which one caused more or less of the plaintiff's injuries.

Thus, it is no more accurate to say that joint liability makes a defendant possible have to pay for something they didn't do or didn't cause than it is to say that when three people rob a bank and in the getaway one person is shot, each of the robbers caused only one third of the victim's gunshot wounds. For the same reason that each of the robbers can be criminally sentenced to the full sentence allowed for the offense, rather than for just one-third of the sentence, each joint tortfeasor can be looked to to pay the entire cost of the injuries caused by their misconduct.

What joint and several liability primarily accomplishes is to shift the burdens and risks of collecting a judgment from the wrongfully injured person to the wrongdoers who caused the injury. If because of insolvency or other reasons, one tortfeasor cannot in fact get contribution from another, then at least the injured person receives full compensation from an entity adjudged to have acted wrongfully in a way that in fact caused the injury.

When joint and several liability is properly understood, it does not seem unfair, and there appears to be little reason to change this venerable tort principle for any sort of loss.

B. The Focus of Section 206 on Noneconomic Loss is Based on the Erroneous Assumption that This sort of Loss is Not as Serious or Important as Economic Loss

While, as I have just explained, there appears to be no reason to tinker with joint liability for any kind of loss, the choice in section 206 to alter this principle only for noneconomic loss appears to rest on the view that this sort of loss is less important or serious, or that it is more subjective than economic loss and thus somehow more suspicious. This kind of thinking seems to rest on the premise that what can be objectively measured in money is somehow more real or serious than those aspects of an injury, such as pain, or shame, or infertility, or loss of sexual function, that do not have a verifiable market value.

It is only this lack of a readily available market valuation, like an earnings rate or a medical bill, that makes nonpecuniary loss appear more subjective than economic loss. But economic loss, too, is subjective in the sense that two people that suffer the same injury in the same accident will have individually varying levels of economic loss. If the Senator and his or her secretary are both injured in a plane crash, the Senator's economic loss will be far greater than the secretary's, even though the secretary's economic need and devastation from the loss of earning capacity may in fact be greater.

Even though nonpecuniary losses do not have a readily available market pricing reference point, damages for these losses can still compensate injured people in a meaningful sense of the word. Of course, if what we mean by compensate is cure or restore the lost capacity, even economic loss damages do not heal the broken leg or restore the mobility or bring back the diminished earning capacity. They only help the victim approximate the financial position they would be in but for the injury. Noneconomic loss damages compensate in the same sense. While they too, cannot make the pain go away, or restore the fertility taken away by the Dalkon Shield or the DES, they can enable the injured person to obtain better therapy, to adopt a child, or to afford other activities that may bring back some of the lost fullness of the human experience. Nonpecuniary loss damages can restore an important

[14] For excellent discussions of the function of joint and several liability and careful explanations of why those who argue that it makes defendants pay for harm they did not cause, see the work of Professor Richard Wright. See, e.g., Wright, "Allocating Liability Among multiple Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure," 21 U.C. Davis L. Rev. 1141 (1988); Wright, "The Logic and Fairness of joint and Several Liability," 2 Memphis St. L. Rev. 45 (1992).

[15] The one exception may be the case of multiple or pile up collisions, where the first impact breaks the ribs, the second impact breaks the arm or the skull, etc.

measure or control over one's life by providing the financial ability to pursue options that otherwise would not exist. They also serve to make manufacturers internalize more accurately the true social and personal costs of their injury causing activity.

Congress itself, less than two years ago, recognized the important and devastating nature of nonpecuniary loss when it enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, and added compensation for nonpecuniary loss to the allowable recoveries for employment discrimination, including sexual harassment, The Report accompanying that Act [16] often stresses that the most significant aspects of injury may be the nonpecuniary—the emotional distress, the shame and humiliation and loss of dignity and self-esteem, the alterations in activities others take for granted.

The significance of nonpecuniary loss is especially true in the case of defective products, drugs, or medical devices, such as many of those discussed above, that cause sexual or reproductive injuries. Many kinds of devastating injuries do not lead to much economic loss, because they may not occasion lost time from work, or they may not require extensive hospitalization. Consider DES or the Dalkon shield, for example, which caused many women to become infertile, thus robbing them and their loved ones of the ability to have a child or to suffer the tragedy of a miscarriage. DES also left some men with severely deformed sexual organs, unable to function sexually or to reproduce, with their entire sense of self and masculinity irreparably damaged. Lest you reflexively think that economic loss is more serious, ask yourselves which injury, if you had to choose, you would rather endure: broken bones which cause you to lose some time from work and incur hospital bills but from which you fully recover in a few months, or a loss of sexual function or the ability to reproduce, which results in no lost time from work, and because it does not happen catastrophically, does not require hospitalization, but which alters the entire rest of your life and your social relations.

Many of the products intended to be used by women cause injuries that are primarily reproductive or sexual in nature, and thus that lead to greater nonpecuniary loss than economic loss. Because reproductive and sexual injuries are not likely to lead to significant wage loss, but can be emotionally devastating, nonpecuniary loss damages are the principal type of compensation for these injuries. Unfortunately, there are far more known instances of products that have injured women's reproductive capacity than men's partly because far more cosmetic or reproductive-related products have been developed for women's bodies than for men's. Because injuries to this fundamental aspect of human life tend to be compensated, if at all, largely through nonpecuniary aspects of damages, any limitation of recovery or increased difficulty in receiving full recovery for nonpecuniary loss can have a particularly adverse impact on women.

Reproductive capacity, the ability to share physical and emotional intimacy with others, personal appearance (such as the absence of disfiguring scars), and self-esteem are all aspects of injuries that primarily affect people in non-pecuniary ways. These aspects of injury may well be more serious and lasting than a loss or reduction in earning capacity or the incursion of medical expenses. Full compensation for nonpecuniary losses like loss of fertility is one way that society, through the tort system, signals that these are important aspects of life, at least as important as the ability to earn a ceratin level of money. compensation for nonpecuniary los is also a way that the tort system signals to product manufacturers that they have to regard and protect these fundamental aspects of human life, by, for example, adequately testing for adverse reproductive effects when a drug or device is to be used in connection with a woman's reproductive system.

Currently, the tort system is the only available vehicle for protecting these human interests that cannot be reduced to out-of-pocket loss. While health insurance, disability insurance, workers' compensation, or other insurance devices can help protect against economic loss, the tort system is the only place injured people can turn for recognition of the value of nonpecuniary losses. Any legislative curtailment of an injured person's ability to collect fully from a tortfeasor responsible for their harm sends the perverse social message that we value someone's ability to earn a paycheck more than her or his ability to have a child, or to love, or to be an emotionally intact person. We must be careful lest we wind up creating a legal regime that says some things are so priceless they are in fact worthless.

Senator BRYAN. Thank you very much, Professor Finley.

I am going to ask the chairman to continue the hearing, and run over and vote. And I will give him a chance to ask some questions.

[16] H.R. Rep. No. 102-40, 102d Cong., 1st Sess. (1991).

The CHAIRMAN [presiding]. Let me just yield to my colleagues. You have got the order here. Well, we do have to go vote I think.

Professor Finley, I appreciate the comment on section 206, because they put it in a noneconomic loss. The case I just cited, where the two sons had lost their mother. She was not in the earning capacity, so that would be noneconomic, and that would have been the loss of a mother.

I have had these arguments in torts before, noneconomic are forbidden under section 206, specifically. They talk about a balanced bill. We have got section 101 that force feeds a so-called negotiation. And if you come to me as a lawyer on the other side, and you say I will offer you $500,000 and I said, "No, I think that the case is worth more than that. I have talked to my client and my client says absolutely not." I said, "I tried to reason with the client" and said "Look, you have got to get all 12, you have got the burden of proof of these other things," and the client says "No, I am not going to agree, I want my trial."

So, we go to court and we have the case and we win it. We substantiate and comply with the burden of proof, and the jury comes in with $400,000, then I have got to pay the corporate lawyers lawyer's fee. Now, if you want to talk about injury, these corporate lawyers, I know that is one of the big faults, they do not want trials. They want to sit up there on the 10th floor on all of those oriental rugs and everything else and get continuances. I do not get paid until I win the case. And if I do not win the case, in most instances, I assume all the costs and everything else of that kind. That is the contingent-fee basis.

So, there is no balance there, where you take away your seventh amendment rights to trial by jury, by limiting it with that particular threat. And of course it is fundamentally flawed in addition to not having balance. They never would come in with Federal jurisdiction. If we wanted to make a congressional finding that it is necessary as a matter of public policy, then we ought to be given this over to the Federal courts and go initially into there. They never wanted to do that. They want to leave it to the State courts with Federal guidelines.

And you talk about reinventing government, there is one big way we can do it and that is to avoid this bill, so we will not have the bureaucracy of going all the way up the line. That is the trouble with this legislation. Because you win your case, you have to go to the State supreme court, then go back into the Federal district courts, and then you go all the way to the U.S. Supreme Court. We are going the way of Japan, while Japan is trying to come our way, in limiting the bureaucracy, the appeals and everything else.

But I am afraid, with that five bells, if I wait for them to get back I might miss it. So,the committee will be at ease until the return of the chair.

[A brief recess was taken.]

Senator BRYAN [presiding]. The subcommittee hearing will reconvene.

My apologies to the witnesses again, but these votes are unscheduled and we really have no choice.

We now have a continuation of our round of questioning.

Mr. Pritzker, let me ask a question of you, if I may. I share the concern that Senator Lieberman voiced early on, in the need for us to have a high-technology value-added manufacturing as a absolutely indispensable part of our infrastructure for us to be competitive as a nation, for our standard of living to improve. So, I am very sympathetic to the observations that he made.

What is always difficult in the three hearings that I have presided over on this issue, as you will note from the response by my colleagues on the panel here, this tends to engender a good deal of emotion on both sides of the proposition. I am looking at a survey of findings by 96 members of the National Association of Manufacturers that were conducted earlier this year, February 1993, in which your members were asked what are the major problems that they face.

And let me just cite a part of this response done by a survey group, not done by any one of the protagonists, not by consumer interest groups or trial lawyers or the chambers of commerce, or those who have taken positions one way or another. And by a very wide margin, 54 percent, a majority, said their problems primarily dealt with mandates and regulations arising out of Government policies. They indicated loss of investment, tax credit, environmental regulations. I am giving you the paraphrase of this, but, essentially, only 8 percent responded that product liability was one of the principal problems.

I am not trying to denigrate that that may not be a factor, but in terms of trying to get a handle on this, when witnesses come in as proponents of this legislation, as you are, and I say this with great respect, this becomes the be all, end all of the success of business in the 1990's.

Let me just kind of get your response to that, Mr. Pritzker. This is a survey done by Peter Hart and Associates.

Mr. PRITZKER. Senator, I am not a pollster, and I cannot respond to this particular poll.

Senator BRYAN. No, I am not trying to blindside you here. What I am saying about this, for those of us who are trying to come down and make a decision on that, this seems to suggest that product liability is not as big an issue as sometimes people who come before the committee suggest.

Mr. PRITZKER. Well, let me say this. I was once invited to a White House conference on small business. And they had thousands of people represented there. It was a mob. The No. 1 issue among that group was product liability. The No. 4 issue, as I recall, and this was a couple of years ago, was a form of product liability under different words.

When you ask the—if you ask me to name the biggest problems in business, I do not know that I would pick product liability as No. 1. I have plenty of them, in fact. Would you like to hear my problems?

Try the Japanese, the Chinese and a few others.

Senator BRYAN. Sure.

Mr. PRITZKER. But regulation in general, or Government regulation, I think is far worse. And I think the legal system needs a good deal of overhaul, not just product liability, to make it fairer, more efficient, and less costly.

But we are here talking about product liability. And in that regard, it is a very important thing. And you can have all the polls you want. I know what I see. And since we have, in my own company's relationships, about 125 factories, I can see—and these are comparatively small businesses—I can see the terrible problems that each one of them has. And the system, with its imperfections and the number of lawsuits we have, make it extremely costly. And I really am sincere about this, I do not think it benefits the consumer, in general.

Now, if somebody does something that is downright illegal, as the Professor is mentioning, I surely think they should be prosecuted criminally. I believe that we should compensate people for mistakes we make. I think we should make our products good. I have no problem with that.

I believe in a tort system. And I believe that you should sue when people are irresponsible or negligent, as Senator Hollings said. There is no excuse for that.

It is when we do the job right. One product line we had was safety valves. And we have gotten out of this business—I do not want to hear about them any more. What do you do when you put a safety valve on a tank and it is overfilled by someone with, say, propane. Well, if it is overfilled and the tank is put in a warm place, the safety valve that operates correctly will allow gas to escape so you do not have an explosion.

Now, what if somebody lights a cigarette next to that?

We ended up getting sued.

Now, whether we win or lose or whatever, it is very expensive.

These are the problems that I would bring to your attention.

Senator BRYAN. I thank you for that response.

Professor Finley, I am just going to ask one more question here, because some of my colleagues I know have been waiting a long time to get a chance to examine the panel.

Whether it is real or perceived, and we get into a great debate here in terms of whether or not there is an explosion in the litigation area and the court system—I mean, as chairman of this subcommittee, I have heard people bring persuasive documentation that adjusted for growth in the population that there really is not an increase in the amount of litigation in terms of product liability. I have heard people on the other side indicate that the system is being stifled. So, I mean there is just the two extremes that are presented.

My question to you is that clearly there is a perception out there with respect to manufacturers that there is a major problem in the tort liability system. And, clearly, anecdotally, we hear people who I think come in good faith expressing their convictions, just as you did with your analysis of the significance of noneconomic injury, which I thought was a point well taken.

They believe that there is a problem, and their conduct appears to be altered as a result of that perception. If that is true, and there are products that do not get introduced, that is clearly not a benefit to our system.

Share with me your own perception as to whether or not you think that is true. Should there be changes in the liability? If S. 687 is not the Holy Grail, what changes should we make, if any?

Ms. FINLEY. There are several parts of that very important question.

First, I would agree, if there is a perception that products liability is out of control, and if people are truly not introducing truly safe, well-tested, beneficial products for that reason, that is a problem. However, I think one has to be very careful in evaluating the claims of that perception and the claims made about whether the products used to illustrate that perception are really as safe, thoroughly tested and effective as the claimants say.

First of all, again, this can only be done at the level of anecdote, which is unfortunate, but I and other professors that I know have had friends who were general counsels of companies say to us in private—you know, looking over our products liability suits, it really is not that bad. It is not unreasonable. It is really a minimal amount compared to our profitability. But I cannot ever say that in public, because the company's public position is that it is ruining us. So, when I go out in public, I have got to say that we did not introduce a certain product because of products liability.

I would also say that if they are truly—in a few instances—truly claiming that it was fear of products liability that led them not to introduce the product, I, as a law professor or a lawyer, would want to ask some very searching questions about—what kind of testing did you do, and did the testing reveal any problems—and try to get underneath the claim and find out perhaps the reason they were reason they were fearful of a products liability problem with that particular product was because their own testing showed there were some dangers. And if that is true, then that is an instance of the system working.

In fact, one of the best arguments for the deterrent value of the system that I have heard in a while was made by Ms. Nimmons in her testimony. She said that because of their fear of product liability suits, her company has developed stringent quality and safety standards.

I am absolutely delighted to hear that. I would have been more delighted if she had said because of our concern about human health and safety, regardless of products liability, that is why we have stringent quality and safety standards. But if it is only products liability that is making the company develop stringent quality and safety standards, and if it is only the perception and the fear of products liability that is making them do that, then that is good.

So, the perception can often work to the public's benefit, as well as the anecdotes about not bringing good products to the market.

Senator BRYAN. Thank you very much, Professor Finley.

Let me now defer to Senator Gorton.

Senator GORTON. Professor Finley, you do take I guess most of here at least on this panel back to law school and to these wonderful hypotheticals. But at least in some of these cases, we are not dealing with hypotheticals.

Senator Rockefeller referred to a company called Biogen, whose chief executive officer and chairman has submitted a statement for the record. He said they spent $60 million attempting to develop an AIDS drug that did not work. And they lost the $60 million; that is a business risk that he is willing to take.

They went back to the drawingboard to develop an AIDS vaccine and they have now decided they will not develop it. And he said, "I am not prepared to bet the future of Biogen on the random lottery of the American product liability system. I myself have made the strategic decision not to pursue the development of an AIDS vaccine in the current environment because there is a significant likelihood that the courts would bankrupt my company by awarding large judgments to sympathetic plaintiffs, regardless of whether the vaccine actually caused the injury."

Now, is it your view that this man simply does not know how to run his company and has made a bad business decision? Or, is it your view that the present product liability system is so valuable to society that you are willing to give up an AIDS vaccine in order to maintain it in its present form?

Ms. FINLEY. It is certainly not my judgment to make about how this gentleman is running his company.

I would also state, vaccines present a very special and unique case, and there is nothing in this bill that is going to help the gentleman who runs Biogen with his fears and his concerns.

Senator GORTON. Well, he thinks there is.

Ms. FINLEY. But the bill is going to—products liability cases will still exist. They will still be brought. And to a large measure, the substantive provisions of the bill, except for the punitive damages provision, essentially codify the laws that exist in most States. It is not, as Senator Rockefeller has pointed, it is not changing that much in many respects.

So, if what they are worried about is an occasional unethical lawyer, a frivolous lawsuit, runaway jury, this bill is not going to stop those problems, and they ought to be doing things like persuading Congress to undo its watering down of the Federal rules sanctions against lawyers for frivolous lawsuits. You just made it much harder for people to get sanctions against lawyers who bring frivolous lawsuits.

So, if what they are all saying is their fear is created by the prospect of a frivolous lawsuit and a runaway jury, well, then deal with that fear by strengthening the sanctions for frivolous lawsuits. Do not deal with that fear by throwing the baby of the good lawsuits out with the bath water of the frivolous.

Senator GORTON. So, in this case, if this man tells us that under the present system he will not go ahead, if this law passed he would go ahead, you just think he is making a bad judgment?

Ms. FINLEY. No, I am saying vaccines are a very special case, because, given their nature to work, they, as we know, have to have some of the live virus. And they are one of these products that carry an inherent risk that even when perfectly made and tested cannot be eliminated. I mean in recognition of that, that is why Congress, for other sorts of vaccines, has passed special vaccine-particular provisions or the Government has agreed to indemnify.

I would suggest that with the very important public health concern for an AIDS vaccine, the way to deal with that would not be to tinker with other aspects of products liability that are not going to have anything to do with the AIDS vaccine, but, rather, to legislatively focus on that particular problem, and perhaps pass a law

where the Government would agree to indemnify the manufacturers of this crucially, desperately needed vaccine.

In other words, you have the ability to devise a solution that truly would take care of his problem, and this one will not.

So, if he thinks this bill will help him, I wish he had been able to come. I was told he might. In that regard, I think he is mistaken.

Senator GORTON. All right. Let us deal with the woman who is sitting right next to you. She is not making vaccines. She is one of two surviving sporting goods equipment companies in a particular field out of I think 22 a few years ago. And she cannot manufacture a new or a better particular kind of helmet because a supplier of a small part will not sell it to her. Evidently, there is not enough money in it for this person who is just simply not going to deal with the present law.

Is the sanctity of the present law, in particular the rules relating to joint and several liability, which is obviously a major factor in the decision of that supplier—so important that her company should be at risk every time it manufactures any product of going out of business because of a huge judgment, costing 100 or 150 people their jobs? Would the United States be better off if her company and Riddell—is that the name of the other one?

Ms. NIMMONS. Yes, sir.

Senator GORTON. Went out of business, and the only way we could get football helmets was to buy them by mail order from Taiwan?

Professor FINLEY. Being an ardent Buffalo Bills fan, of course I would say that neither Buffalo nor the United States would be better off if her company went out of business.

Senator GORTON. But she has real, practical problems with this situation that have nothing to do with vaccines and have a great deal to do with product liability. Do you just want to punch her card and say tough, or do you think she is making bad business decisions?

Professor FINLEY. Well, maybe I will have a chance to talk to her more after the hearings, but everything I heard her identify as a problem this bill is not going to address. So, it is like they are offering as a solution to certain problems something that really is not a solution.

The concerns I understood her to express were the concern about frivolous lawsuits. As I have already explained, this bill is not going to stop that. The concern about possibly, you know, no matter how conscientious they have been, a aberrant runaway jury and a judge who will not respect the law of directed verdicts. This bill is not going to stop that.

As for the supplier, you know, perhaps their concerns are irrational. I obviously do not know enough about the particular component part in question, but existing——

Senator GORTON. Well, it is obvious that their concerns are joint and several liability. If they are putting 2 dollars' worth of equipment into a $100 item, they do not want to be——

Professor FINLEY. But, the only way, under current products liability law, the component part manufacturer could be found liable,

whether severally or jointly, is if it turns out that it is the component part that has contributed significantly to the injury.

Senator GORTON. No. If a jury makes the decision that the component part was a 5-percent factor in this. That is quite different from whether or not it did, and the business judgment has to be made on that. The business judgment is, I am not going to sell a $2 part under these sets of circumstances because I cannot possibly make enough money from selling 1 million of them to run even a small risk of one judgment. But if I had a joint and several liability provision like this one, I might very well be willing to make that sale.

Now, that is the business judgment that Mr. Pritzker makes and Ms. Nimmons makes. You are talking about a theory; they have to deal with these actual verdicts. And you are really saying that, no, the present system is fine, they have just got to run those risks, but you really do not want her to go out of business.

I presume that we could get all of our sporting equipment from Taiwanese companies which did not do business in the United States, just operated by mail order. You would never be able to sue them. Now, would that be an improvement?

Professor FINLEY. Under my understanding of long-arm statutes, if they sell, whether by mail or with a store in the United States, you, indeed, could get jurisdiction over them.

Senator GORTON. How are you going to enforce that judgment against that Taiwan manufacturer?

Professor FINLEY. It might be difficult.

Senator GORTON. I think it would be very difficult.

Professor FINLEY. But it is sometimes difficult to enforce many judgments.

I am not saying that there are no problems in the existing products liability system. I have talked about—I mean there are many other—you know, I have focused my testimony on two particular aspects of this bill that I think raise some concerns that maybe have not been adequately considered.

Now, back to the question about if a jury decides that that component part is only 5-percent responsible for the injury. I think that while juries probably often misunderstand joint and several liability, I think that that is, I take it—your comment suggests you think that that would mean that the single injury of, let's say, brain damage from a malfunctioning football helmet, the jury can somehow decide that only 5 percent of it was caused by the component part and the other 95 percent was caused by other aspects of the helmet.

Usually, comparative fault or the assignment of percentage responsibility is not based on that sort of metaphysically impossible calculation of this percent of the single injury was caused by that. Remember, to even find liability, whether it is joint or several, the jury is supposed to have to find that the component part or the whole product or whatever was a substantial factor in the entire injury.

So, if you are saying, well, but juries might not follow that law, I go back to saying if what they are really concerned about is an aberrant jury, a frivolous lawsuit, something like that, this bill will not stop that. They should be working on sanctions for frivolous

lawsuits and more vigorous use of directed verdict or judgment notwithstanding the verdict motions by their attorneys.

And then if they say, "Oh, but legal costs are too high," I have often felt that manufacturers themselves have a great deal of ability to keep down legal costs that they have not often enough resorted to. And I want to, for this, commend Zoe Baird at Aetna for being a pioneer in this area. Rather than allowing Aetna's outside lawyers to continue to work at very high hourly rates, she started negotiating arrangements of a set fee or a cap. And they found many good lawyers to continue to work for them on that basis, and it has dramatically reduced their legal costs.

And I say to all manufacturers who are concerned, truly it is a very real problem, defense legal costs. There are ways you can deal with that that are wholly independent of this bill, and I hope they will start doing that.

Senator GORTON. This is a question that you can answer now or later, because I suspect in one sense it is an unfair question, Professor Finley. This morning we received a study published today by the Rand Corp.'s Institute for Civil Justice called "Product Liability and the Economics of Pharmaceuticals and Medical Devices."

And just to read a couple of highlights, one is:

> Liability has caused companies to withdraw from the market products that had widespread support in the medical community.

A second comment is:

> Numerical simulation suggests that liability can substantially decrease incentives to innovate in product areas for which large liability costs seem plausible or financial disaster from liability is believed to be even a slight possibility.

And while I suspect your answer to those two points would be the one you have already given, that this bill does not deal with that subject, their specific recommendations are, one, to make regulatory compliance central for drugs and extensively regulated devices; that is, the FDA defense which you criticized. Two, specify explicit standards for behavior warranting punitive damages, and exactly the explicit standards they set are the standards set in this bill.

As I said, I am perfectly happy to have you read this entire report, which I suspect you will, and comment on it.

Professor FINLEY. Yes, I would like to.

Senator GORTON. But it seems to me that we have this most recent statement that this bill is, in large measure, exactly what is needed in this field.

Professor FINLEY. Well, again, as I understand, having heard a very little bit about that study before it was released, that it, again, is basically a report of what the perceptions are. And we have already talked about, you know, the perception issue and how to address that and how not to address that.

But in particular about the perception of not bringing good products to market and then offering as the solution, you know, insulation from punitive damages, I want to particularly address why I would say to anyone who says there is a connection between their perception and punitive damages reduction as a solution, that there really is a gap there.

Punitive damages can only be imposed, as this bill specifies, for conscious or flagrant disregard of safety. So, if a company says we are afraid to bring a good product to market because we might get hit with punitive damages, and the standard is conscious and flagrant disregard of safety, is that company basically admitting that they might engage in flagrant disregard of safety? If you do not engage in flagrant, conscious disregard of safety, why do you have anything to fear from punitive damages?

I hope that the next time someone appears before you and says we are afraid of bringing a good, well-tested, sound drug to market because of punitive damages, you will ask them that question. I want to know their answer. I have yet to hear a good answer to that question. If it is truly a good, safe, well tested drug, you have nothing to fear from punitive damages, so why would you propose taking away from victims of the not good, not safe drugs their right to get punitive damages because you, a good, safe company, is afraid of them. It just does not make sense.

Senator GORTON. I have run over my time, Mr. Chairman. Thank you.

Senator BRYAN. Thank you very much.

Chairman Hollings.

The CHAIRMAN. Well, we have got another important panel and lunch coming on, but we went into that helmet thing. Professor Finley I obviously enjoyed your last observation, because that is the general feeling of trying to protect the public. And we run down these side roads.

During the last debate, the distinguished ranking member and the former chairman of this committee, said they had gone out of business in helmets. And we cited at that time the incidence here of the new helmet manufacturer here in Virginia, or West Virginia, Athletic Technologies, and the manager, Mr. Bill Hamlin, who said that the helmet business needs more controls.

I have just asked the staff, is he still in business? They said "Yes." So, he was going into the business in spite of all the particular misgivings cited by our colleague from Washington. The fact is that we took down the Riddell, from Chicago, Buffalo Bills helmet, if I remember correctly, and put it on the desk at that time of debate, because you cannot get these Senators attention. And all they had to say was that nobody makes them here, you have got to go to Taiwan. Go to Taiwan, that is where they are making them.

I look every Sunday and we can see them there. And they are American-made helmets, I am almost willing to bet they have got 90 percent of the business. Not Taiwan, but Riddell out of Chicago.

Thank you, Mr. Chairman.

Senator BRYAN. Thank you very much, Chairman Hollings.

Senator Mathews.

Senator MATHEWS. Thank you, Mr. Chairman.

Now, let's continue along the line that Senator Gorton and Senator Hollings were talking about, and let me ask Ms. Nimmons here. First, let me preface my remarks by saying we are delighted that you are in Tennessee and hope you find a good business climate there. And we have good lawyers too.

But obviously you have had some experiences that will be helpful to us. Your statement, I did not get a chance to hear it, but I have

perused it a little bit. What is the other side of the argument to what Professor Finley is saying? How does this bill—how will it assist you to continue?

Ms. NIMMONS. Well, first of all, let me just clear up a couple of issues. Senator Hollings, ATI did go out of business.

The CHAIRMAN. It did?

Ms. NIMMONS. In fact, their helmet was involved in the Mike Utley-Detroit Lions catastrophic injury, and as a result of that one injury they ceased doing business. So, unfortunately, that is how we got down to two manufacturers.

The CHAIRMAN. Is Riddell still in business?

Ms. NIMMONS. Yes, sir. But I would disagree about your 90 percent of the market estimation. I will take exception to that.

The CHAIRMAN. What percent?

Ms. NIMMONS. Well, it depends on what market you are talking about.

The CHAIRMAN. Professionals.

Ms. NIMMONS. Professionals is a different kind of arrangement because Riddell gives free helmets to the NFL. In fact they did a deal——

The CHAIRMAN. We are talking about safety. [Laughter.]

Ms. NIMMONS. It depends on the team. So, depending on which team you are talking about, we do very well.

The CHAIRMAN. Excuse me.

Ms. NIMMONS. We do very well in South Carolina also. I appreciate the business in that State.

The CHAIRMAN. Good. [Laughter.]

Senator MATHEWS. Tell us how this bill is going to be helpful to you.

Ms. NIMMONS. Now, as far as this bill is concerned and what they are talking about, part of the problem that we are running with in finding vendors to work with us is just the fear. I agree—and I am not an attorney, I am just a business person, and I am just looking at this bill from the business standpoint. And I am dealing with other business people and maybe they do not understand the entire legal system involved with tort law.

It is the fear of being involved in litigation. As you look at the expense of defense in its entirety, even though they would be found not to be a contributing factor to an injury, it is just the point of being involved. Any time a product liability lawsuit comes through the door, the cost does escalate.

And we do a very good job of trying to contain those costs. We work at it on a day-to-day basis, as does the vast majority of small business people. It is something that is dealt with day in, day out. But the fear factor of being involved and having rising costs associated with litigation is what is keeping some of these vendors from wanting to supply our company.

Senator MATHEWS. Let me ask this, Ms. Nimmons, has it been your experience in the litigation that your firm has been involved in that the juries understand the standards of liability as well as Professor Finley does?

Ms. NIMMONS. I do not think so. I spent 7 weeks in a small court outside of New Orleans last summer in a products liability lawsuit. It was the most emotional experience of my life to watch a cata-

strophically injured young man be wheeled into the court of law every day. It is a tragedy. But unfortunately he was injured as a result of an accident, and there is no protective equipment designed to prevent all accidents from occurring.

But watching the 12 people sitting on the jury, there were men, there were women. Some of them understood the sport of football, some of them did not. It was very difficult and it was very emotionally difficult for them. I could tell by watching the expressions on their faces when the verdict of not guilty was read, they had to face—you know, they live in the same area that this young man lives in, and it was a very emotional experience for them to tell that young man, no, the helmet did not cause your accident. When it comes right down to it, the sympathy factor is very hard to deal with. It is really a very sad circumstance.

The CHAIRMAN. At this particular point, Mr. Chairman, let me echo the sentiment Ms. Nimmons expresses. We went through that in Charleston, SC. Everybody knows down there the wonderful Citadel football player, Nick Buoniconte's son, and he was injured. They looked, and I know the lawyers and all, and they were going after the helmet.

It was terrible because he was wheeled in over 3 weeks. It had to do with malpractice. They found they could not really make that case on the helmet, so they went after the doctor. And it was a very emotional thing, and the jury came in for the defendant, the doctor, not for the plaintiff.

So, my friend Nick Buoniconte's son did not win that case. You have jurors that listen and they make their judgments. And I happen to participate still in a fund. We are trying to see if we can medically do better on nerve injury. But I know exactly what you are talking about.

But that does not mean because it is an emotional case, bam-bam, the jury is going to run away with a big, outrageous verdict on account of the emotion. I saw that emotion, we felt that emotion, and he did not win his case.

Senator MATHEWS. Did you want to comment, Mr. Box?

Mr. BOX. I am sorry, Senator Mathews. I will wait.

Senator MATHEWS. If it is on this point, go ahead.

Mr. BOX. Actually, it is on a couple of points that have been raised.

Mr. Chairman, the key word that we keep hearing over and over is "uniformity," that we need laws that will provide uniform product liability treatment in all the States. This bill is not going to provide for uniformity. This law, if enacted, will be interpreted in State court, 50 different State courts. And those interpretations are going to vary based on the interests and needs of the people in the 50 individual States. So, if uniformity is the goal, this bill fails.

And the other thing that I stress that this committee needs to do is to scrutinize very carefully the proponents who come into this committee and claim that product liability is the major reason for a decline in research and development, and is a major contributing factor in businesses closing down.

The most important factor has to do with the cost of capital. And as any economist will tell you, one of the major contributing factors

in that problem is this Nation's deficit. And that, gentlemen, is something which you are uniquely suited to solve.

I would suggest that you focus your attention on the factors that you can immediately affect, and let the States do what they are best suited to.

Senator MATHEWS. Mr. Box, I appreciate that comment. I was not sure what we were sent up here to do, but that gives us some guidance. [Laughter.]

The problem I have, in addition to the ones that Ms. Nimmons has here in Knoxville in trying to keep our Tennessee team strong enough to beat South Carolina and Washington and some of these other States here——

Mr. BOX. Alabama.

Senator MATHEWS. That is right. We very seldom do that. But the problem I have is also in our State. We have this country's largest manufacturer of water heaters, and they have what I guess Ms. Nimmons referred to also as the perception that they have deep pockets. And we have seen some recent examples of judgments which almost occur as a result of one falling off of a third-party truck and injuring someone.

It is real. The problem that Ms. Nimmons talks about is real. Now, how we deal with it, I do not know. How do we deal with a situation where a product is manufactured in one State and is subjected to the product liability laws of another one, where it is entirely different and subject to change?

Now, I grew up in State government. I spent 40 years there and I agree with you that there are a lot of things that Congress ought to stay out of, and a lot of things that we can better address ourselves to than others. But when we find a situation, as Ms. Nimmons here pointed out, that she cannot purchase materials to make products because people are fearful that they are going to be found contingently liable over here for, either you are not your job or we are not doing ours, and I do not know which it is.

Thank you, Mr. Chairman.

Senator BRYAN. Thank you very much, Senator Mathews. Thank you very much to the panel for their comments, and enduring some of our own observations about your testimony and about the comments of each other. We appreciate very much your testimony here.

Professor Finley, I am going to write a letter to you and ask for your followup comments on the sanctions that can be imposed upon lawyers for frivolous lawsuits. That is an area that I think is particularly outrageous, and I would be interested in your thoughts on that. Thank you very much.

We will now invite our second panel to join us. That is Mr. Victor Schwartz of Crowell & Moring, on behalf of the Product Liability Alliance and the Product Liability Coordinating Committee; Ms. Pamela Gilbert, the Director of Congress Watch; Suzell Smith of Howarth & Smith; and Prof. Michael Saks of the University of Iowa School of Law.

Mr. Schwartz, we will hear from you first, after you get that glass of water.

STATEMENT OF VICTOR E. SCHWARTZ, ESQ., CROWELL & MORING, ON BEHALF OF THE PRODUCT LIABILITY ALLIANCE AND THE PRODUCT LIABILITY COORDINATING COMMITTEE

Mr. SCHWARTZ. I was trying to think back there, after 12 years, if there is any side benefits to all of this: I have gotten to know a lot of people. It has become sort of like a family reunion. And maybe next year I think some of us will get together again after the bill passes and have the reunion without having to have the hearings.

I want to make a few points very quickly because of things that some of the other witnesses said. One of the changes that Senator Rockefeller and Senator Lieberman made in the bill that is very important is in line 21 on page 19 of the bill dealing with punitive damages and pharmaceutical companies.

The provision says now that the defendant before or after premarket approval of the device will lose his protection or its protection if it fails to supply information. So, if a pharmaceutical company hung back, as was suggested by another witness, and did not supply relevant information, it would lose its protection.

There are some documents that I would like to just very quickly just put in the record. There is a group called the American Legislative Exchange Council. It is a conservative State legislature group. And this year, in 1993 once again, it approved unanimously, 2,700 State legislators, a resolution calling for the enactment now of a Federal uniform product liability law.

Senator BRYAN. We will make that statement part of the record, Mr. Schwartz.

[The information referred to follows:]

PRODUCT LIABILITY RESOLUTION

Summary

In the past two decades, a majority of states have enacted laws governing product liability legislation. The laws are intended to be fair to everyone in the chain of sale, from manufacturer to consumer. The purpose of product liability legislation is to provide predictability about product liability rules for product sellers, manufacturers, and insurers and to inform injured parties about their respective rights. A few states, such as New Jersey and Ohio, enacted comprehensive product liability statutes, and in some other states legislation was designed to resolve problems unique to that state, such as an aberrant court decision or problems common to a major industry located in the state. Individual state legislation has not completely accomplished these twin goals of fairness and predictability, because product liability is a matter of interstate commerce. On average, 70 percent of products made in an individual state are shipped out of that state. State-by-state product liability law, therefore, provides only partial benefit to manufacturers and sellers within a state. On the other hand, if the legislation is harsh (e.g., short statutes of repose that have no exceptions) it can unreasonably curb the rights of people who live in the state and are injured by products. If all states adopted the same product liability law on their own, reasonable uniformity and predictability would be achieved.

The history of the past several years shows that product liability reform occurs slowly, if at all. For example, the Pennsylvania legislature has struggled more than 10 years to enact a reasonable product liability law, but to date has been unable to do so. This is a principal reason that the Reagan and Bush Administrations, which are particularly sensitive to states rights, have gone on record in favor of a uniform federal product liability law. A federal product liability bill should embody some general precepts that have been incorporated in past federal product liability bills and in some state statutes. These precepts include reasonable standards for manufacturer liability; limits on the liability of product sellers when the injury was not caused by the seller's negligence; limits on the application of joint and several

liability; for punitive damages, reasonable standards for liability and clear and convincing evidence concerning the burden of proof; encouragement of alternative dispute resolution procedures; and procedures for offsetting workers' compensation payments from damage awards.

Model Resolution

[Title]

Whereas product liability has created serious problems for interstate commerce;

Whereas common law or case law product liability law has created a situation where product sellers have little or no predictability with respect to their obligations in designing a warning about products. So, too, insurance underwriters are unable to set product liability rates in a rational manner, and consumers are unaware of their rights if they are injured by products;

Whereas individual state legislation has been able to address only a portion of this problem because products flow in interstate commerce, and state legislation cannot give nationwide predictability to product sellers, insurers, and consumers. Although a number of states have enacted product liability laws, these rules have not always been comprehensive and they vary in key details. Unfortunately, they have not fully resolved the product liability problem.

Therefore, be it resolved that it is the sense of this legislature that a reasonable, fair, and balanced federal product liability law be enacted, and that, in enacting such legislation, representatives of the federal legislature should cooperate with representatives of the state legislatures to help ensure that the goals of fairness and stability will be achieved by enacting legislation that establishes reasonable standards of manufacturer liability, limits the application of joint and several liability, establishes a clear standard of liability for punitive damages, and raises the burden of proof to clear and convincing evidence, provides a defense for product sellers when their negligence did not cause the injury, and avoids double payments by offsetting workers' compensation payments.

Mr. SCHWARTZ. Then we have a statement from the Supreme Court Justice of West Virginia, a State Supreme Court Justice, a Federal judge who edits a journal of product liability, Judge Eginton, a State midlevel appellate judge who edits the product liability manual for his State, and Judge Dreier of New Jersey, all of whom call for the enactment of uniform product liability law.

[The information referred to follows:]

LETTER FROM WARREN W. EGINTON, SENIOR U.S. DISTRICT JUDGE

AUGUST 3, 1992.

The Honorable JOSEPH R. BIDEN, Jr.
U.S. Senate,
Washington, DC 20510

DEAR CHAIRMAN BIDEN: I am a Senior United States District Judge from Connecticut, I have been an active trial judge since 1979, taking senior status just this month, but I will continue my current level or activity trying cases. During my tenure on the federal bench, I have tried some 50 product cases, but more significantly for two decades before joining the judiciary, I tried product liability bases exclusively. In addition, I am Editor-in-Chief of the Products Liability Law Journal. In connection with that assignment, I have had occasion to consider in some detail the theories of product liability law.

My experience tells me that we are attempting to handle product liability law by a horse and buggy method. Product liability has become interstate commerce. Almost every product liability case that has come before me has had contacts or relations with at least one other state. My understanding is that current data show that over 70 percent of goods made in an average state are shipped out of that state. The figure is even higher for Connecticut (80 percent). For that reason, state attempts to stabilize their product liability law have fallen short of the mark. I personally know this is true because as early as 1979, Connecticut enacted a state product liability law, with counter-productive results.

My experience has taught me that there is an inordinate waste or judicial and client resources endemic to the product liability situation as it now exist. I know that your committee is most interested in the caseload of the federal court system. If we are to keep that caseload within the bounds of reason, we must do everything we can to encourage settlement and shorter trials. That cannot be accomplished without certainty, or at least reasonable certainty, in the law applicable to a given

product liability case. Lawyers cannot settle litigation if they do not know what law is going to be applicable to the facts disputed in these matters.

I appreciate that the road toward federal product liability legislation is long and difficult. Political considerations, as would be true with any controversial legislation, have impeded its progress.

Some judges have suggested that if a uniform product liability law was adopted, such as S. 640, courts would take years to interpret its various provisions. It has even been said that more disparate opinions would arise under a uniform federal product liability law than under our current patchwork state system. I have reviewed S. 640 and state, unequivocally, that these assertions are not well founded. S. 640 is refined and polished legislation, unlikely to lead to many conflicts. I will not rehearse the bill, but I hope my point is clear—the provisions of S. 640 can be understood by judges and enforced by them whether they be state or federal judges. Occasionally, as is true with any statute, there will be a difference in interpretation, but such differences will be vastly less than our current system of 51 ever-changing bodies of product liability law.

Senator Biden, I was pleased to learn that Majority Leader Mitchell has scheduled a time for a vote on S. 640. There has been too much delay about a bill that is needed by judges who must deal in a practical way with these cases. There is a clear and present need for federal action and, on the whole, S. 640 is fair and balanced legislation. It will reduce the waste of judicial resources and client resources insofar as it helps to develop certainty in the product area. I hope that S. 640 will be approved by your committee and voted favorably upon by the United States Senate.

Sincerely,

WARREN E. EGINTON,
Senior U.S. District Judge.

LETTER FROM WILLIAM A DREIER, JUDGE, SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

JULY 31, 1992.

Senator JOSEPH R. BIDEN, Jr.,
U.S. Senate,
Washington, DC 20510

DEAR SENATOR BIDEN: Since I am unable to appear at the Committee's hearing to be held Wednesday, August 5, 1992, I thank you for permitting me to express my views in writing. As I have noted in my prior testimony before both the Senate and House Committees considering product liability legislation, the opinions I express are not an official position of the New Jersey courts, but represent solely my own views.

Considering the similarity between S. 640 and S. 1400 (considered by the prior Congress), I have attached my written statement filed in support of that bill as well as my written responses to questions addressed by Senators Meflin and Thurmond. I ask that these comments be incorporated by reference into my current statement.

In my earlier letter to your Committee I gave you a brief summary of my background so that you could better evaluate my comments. Briefly, let me reiterate that I am writing not only as a judge with over 19 years experience on the bench, and in my 10th year in an appellate court, but also as an author of the New Jersey text on product liability law, and numerous Law Review and other articles on the subject. In the 1991-1992 period I have published five product liability decisions, four of which deal with the interpretation of New Jersey's Product Liability Act of 1987 concerning which I have published analyses appearing in the New Jersey Law Journal and Rutgers Law Review (41 Rutgers Law Review 1279 (1989)). I am currently updating the statutory analysis for the 1992-1993 edition of my product liability text.

Cases involving the application of New Jersey product liability statute have now reached the appellate courts. I have had a chance to discuss with trial judges the administration of the statutory cause of action which has replaced the negligence, strict liability and warranty claims formerly included in most product-based-suits. Fortunately, in New Jersey we had historically defined our strict liability claims largely in terms of negligence, and it is this hybrid negligence/strict liability cause of action that has survived.

I see no impediment under S. 640 to our continued development of New Jersey's product liability law which I hope might eventually become a national model. Sec-

tion 301 of S. 640 specifically permits the continuation of our statutory cause of action, where not in conflict with federal law.

As much as I endorse the progress we have made in New Jersey, the lack at uniformity throughout the country presents an intolerable burden upon manufacturers and sellers on one hand, and injured consumers on the other, with concomitant problems imposed on attorneys and judges. For example, a retail chain with stores in the 50 states can well be governed by 50 different approaches to liability. This should not be so, and section 302 of S. 640 goes a long way toward clearing up this problem by removing from the courts claims against sellers so long as a solvent manufacturer is available and the seller has committed no separate act engendering responsibility.

One of the more difficult areas in product liability law involves the imposition of punitive damages. Although New Jersey has opted for a preponderance-of-the-evidence standard, rather than the clear-and-convincing standard set forth in section 303(a) of S. 640, and has enacted some terms in variance with the proposed statute, our experience with the bifurcated proceedings set forth in section 303(d) and statutory standards set forth in 5ection 303(e) has been positive. In fact, the procedure has been recommended for application in punitive damage claims other than those involving product claims. If the Act is enacted, each jurisdiction will be required to apply the same standards for liability in determining the amount of punitive damages, and there would be far fewer cases of multiple assessments of damages which could be ruinous to a defendant. (For example, if a reasonable jury could find that a fair punishment for knowingly producing a defective product was 10 percent of the company's net worth, the 10 percent would hopefully not be imposed in ten different actions throughout the country. In each case the award of punitive damages to persons similarly situated would be considered under section 303(e)(6), as would prospective awards of compensatory damages, criminal penalties and civil fines under subsections (7), (8) and (9)). Without national legislation, there can be gross inequities.

With these benefits comes no limitation of each state's ability to interpret the Act and have its own courts determine the direction of product liability law within the Act's constraints. While this creates some possibility of diverse interpretation, the same is true with any of the uniform acts, such as the Uniform Commercial Code. For decades we have weighed the possibility of variant interpretations of a uniform act against the benefit of having a body of law generated by the courts of each state to aid all in their interpretation. Such will also be true at S. 640 if it is enacted into law.

As I noted in my earlier submission and testimony, there is a cause for concern that judges or juries will have difficulty in applying a federal act, even though there may also be state issues in the case. We routinely apply federal and state law in product liability cases. (See examples such as the cigarette cases, cases involving products regulated by the Federal Food and Drug Administration, claims involving aircraft, etc.). Outside of the product area there may be Jones Act claims under the Federal Employers Liability Act, civil rights claims under 42 U.S.C. § 1983, and claims of federal constitutional rights.

Another strong factor supporting passage is some potential relief for the congestion of the federal courts. Often cases are removed to federal court so that a federal judge will employ a less parochial view of product liability law than a state court judge. While federal courts will look to state law to control a case, many attorneys think that federal judges have better insight into the rules governing potential responsibility than a state judge, especially in the area of punitive damages. Since g.640 provides national standards, if enacted attorneys would have more confidence in permitting the state courts to retain product liability claims. No strictly federal questions are presented, and the only burden on the Courts of Appeal would be to interpret the law where the case has been initiated in federal court. The Supreme Court might have some incremental additional duties if there is a divergence of opinion among the state Supreme Courts or federal circuits concerning the interpretation of the Act. However, guidance to promote uniformity in the entire judicial system is certainly not to be decried.

I again urge the Committee to consider the positive aspects of providing a national product liability standard, as limited as this Act might be. If the future shows that the experience with a national act is as positive as I expect that it will be, other common problems in the field might well be considered. This Act, however, is a needed first step.

Thank you for your consideration. As in the past, I will be happy to respond to any questions you or any member of your Committee may have.Thank you Mr. Chairman and the other distinguished members of the committee for the invitation

to discuss the need for Federal product liability law and S. 640, the Uniform Product Liability Act.

PREPARED STATEMENT OF JUSTICE RICHARD NEELY, WEST VIRGINIA SUPREME COURT OF APPEALS—SEPTEMBER 12, 1991

I have been a judge of West Virginia's highest court since 1973, and I have served three times as West Virginia's chief justice. In that time, product liability law has undergone great changes, but as long ago as 1976 we were beginning to see a "competitive race to the bottom" in product cases. Typically, in product liability case, there is an in-state plaintiff, an in-state judge, an in-state jury, in-state witnesses, in-state spectators, and an out-of-state defendant. When states are entirely free to craft the rules of liability any way they want, it takes little imagination guess that out-of-state defendants as a class won't do very well. And this is particularly true in the states with elected judiciaries where the lawyers for plaintiffs have substantial personal stakes in their clients' cases, and so are generous to a fault in judicial campaigns.

Business justifiably complains of what appear to be utterly perverse results. For example, in 1976 John Newlin, a Pennsylvania farm manager, ordered an International Harvester Front End Skid Loader. That model came equipped with a roll bar, but Mr. Newlin requested that the roll bar be removed so the tractor could go through his low barn door. Jim Hammond, a farm employee, operated the skid loader for several months, but then one day in a freak accident turned the machine over and killed himself. Mrs. Hammond, Jim's widow, sued International Harvester and recovered a big verdict because the skid loader was defective for not having a roll bar. But the roll bar had been removed at the direction of the purchaser! This type of result is typical in product cases and is not necessarily even irrational if we want to create a no-fault insurance mechanism. But it is now time to give rational order to the insurance mechanism that we cave created helter-skelter.

Until about 1960 a plaintiff in a product case had to show that the manufacturer was negligent, but now such a showing is no longer required. Today it is necessary only to demonstrate that the product had either a design or manufacturing defect that caused the plaintiff injury while the product was being used for either its intended purpose or another foreseeable purpose. Furthermore, juries are given such broad discretion that the purchaser—as in the Harvester case—can be entirely at fault yet an injured victim may still recover. Consequently, the more novel, complicated or susceptible to misuse the product, the greater the manufacturer's exposure to lawsuits.

Numerous areas of tort law combine to create what has come to be called "the liability crisis," but it is a mistake to lump product liability together with other tort problems like medical malpractice, liability for defective premises (slip and fall cases), municipal liability, or unfair firing cases. Product liability is a unique problem whose current intractable nature results entirely from the structure of the American court system. And, part of that structure is that in 22 states—like West Virginia, Michigan and Texas—the judges are entirely elected.

Judicial elections mean that almost half our state judges (like me) look a lot more like politicians than they do like candidates for the Nobel Prize in law. Furthermore, judicial elections also mean that a judge must raise campaign money just like any other politician. Inevitably, of course, major campaign contributors—one's mother and the occasional free-lance do-gooder excepted—are people or organizations which expect to recoup their investment several fold. None of this, I am sure, comes as a surprise to the members of this committee or to anyone else who has ever had practical political experience.

In most areas of the law, elected judiciaries perform well because both the plaintiffs and defendants are local residents who can slug it out in the local political arena. One-sided results, then, lead eventually to self-correction, either in judicial elections or legislative revision, that is why in most areas of state law, federalism works. That is also why in product liability, federalism does not work.

Unlike England, France or Germany (our major European competitors), the United States does not have one unified court system. Rather, we have fifty-three separate, uncoordinated court systems. First, there is the nationwide system of federal courts, which is divided into thirteen separate circuits that are only loosely held together by the Supreme Court of the United States. In addition to the federal courts, however, there are freestanding court systems in the fifty states, the District of Columbia, and Puerto Rico. And, as my esteemed colleague, Chief Justice Harry L. Carrico of Virginia, testified on July 31, 1990, ever 95 percent of the nation's judicial business takes place in these state (or state-like) courts.

America's diversity of court systems leads to a diversity of law systems because American judges, like their English predecessors, have extensive lawmaking powers. Because each separate court system is administratively independent of the others, each separate court system is free to generate eccentric judge-made law at odds with the statutory and judge-made law of other jurisdictions.

Although my personal experience has been in a state with elected judges, I have found that many of the most pro-plaintiff decisions—like the Harvester case—have come from either federal judges or appointed state judges. This is because even appointed trial and appellate judges are swayed by the emotional incentives that favor the redistribution of wealth from out-of-state defendants to local residents, which is why product liability law becomes more and more oppressive to business.

By pointing these dynamics out I do not mean to imply that every, or even most product liability decisions are the result of bias against out-of-state defendants or of a cavalier disregard by judges and juries of accepted standards of right and wrong. But it is not the overwhelming majority of ordinary cases that determine the contours of the law; rather, it is the extraordinary cases. Thus, in close product liability cases where fact patterns are on the edge of existing law and the sympathies of a normally compassionate judge or juror would be aroused, there is no local disincentive to nudging the case over the line in favor of, say, a widowed mother of four. However, these hard cases do not stand in isolation: As individual hard cases are nudged across the frontier by sympathetic judges, the frontier itself changes, but only in one direction.

Product liability exposure is one of the most serious long-term problems facing the American economy, but the full dimensions of the problem are as yet only dimly understood by the general public. In general, most large American companies have managed to live with current product liability law without going bankrupt or closing plants. But that is because most large American companies manufacture established products with known liability risks and have devised schemes—such as introducing new products off-shore—to keep their product liability exposure in the American market within manageable limits. Thus, the problem for the American economy is not that product liability will bankrupt otherwise solvent American companies, but rather that the defensive actions that American companies are forced to take to protect themselves from product liability exposure will move research, development and American jobs off-shore.

Not all segments of American society face the same jeopardy from global competition. Thus, the upper middle class of lawyers, judges, university professors, doctors, and other "professionals" are not subject to having their jobs moved overseas. Skilled and unskilled labor, on the other hand, as well as business managers, face constant competition from low cost foreign producers. America, then, is divided into two classes—those for whom America's international competitive position is a life or death issue, and those who are insulated from international competition.

The strength of the Roosevelt administration's New Deal was the breadth of shared economic concerns. Even those who had secure jobs during the 1930's still had parents, brothers, or friends who were out of work. The same broad unity of interest in economic matters does not exist today. Current social stratification produces a leadership class of professionals, journalists and academicians who are both psychologically and geographically removed from the lower middle class of blue collar and clerical workers threatened by foreign competition. Were this not the case, far greater attention would be paid in the media to our product liability law because the big loss from runaway product law is research and development not pursued, new technologies not developed, new products not introduced, market shares not dominated, learning curves not exploited and, most important, NEW JOBS NOT CREATED.

Draconian product liability rules discourage American companies from introducing new products in the American market until those products have been thoroughly tested abroad. However, if the initial product introduction is to be done, say, in Japan, then it is only intelligent to manufacture the product in Japan initially. Logically, if the manufacturing is to be done in Japan, then the research, development and engineering ought to be done in Japan as well. Inevitably, the product becomes a Japanese prrnduct and not an American product. The company doing the manufacturing may be an American company in the sense that it is owned by American shareholders, but the real wealth—namely the jobs associated with the production of the product and the technical skills acquired by managers and labor force—is owned by the Japanese.

There is no "American" law of product liability in the sense of uniform national standards. Given the profile of product liability suits, where the defendant is invariably from out-of-state, there is a "competitive race to the bottom" among state courts to create ever more liberal liability rules. This is not necessarily an intentional anti-

business policy, but simply an exercise in economic self-defense: Any state court (or state legislature, for that matter) that does not keep up with the latest pro-plaintiff rulings is behaving entirely irrationally. That is why when one court pushes the frontier of product liability law further out because of an extraordinarily sympathetic set of facts, the new pro-plaintiff frontier quickly becomes the law for all, or nearly all, of the states.

Simply put, if you ask the average state judge whether she would like to redistribute some wealth from, say, Ford Motor Company to a local resident who was severely injured in a car crash, the judge will probably answer "yes." But if you ask the same judge to make a choice between high local employment in Ford's plants on the one hand, and redistribution of Ford's money on the other, she is likely to favor high employment over simple wealth redistribution. The problem is that except for the U.S. Supreme Court, no American judge can affect these trade-offs.

If, for example, as a West Virginia judge I insist that West Virginia have conservative product liability law, all I will do is reduce my friends' and neighbors' claims on the existing pool of product liability insurance paid-for by-consumers through "premiums" incorporated into the price of everything we buy. This is the explicit rationale of *Blankenship* v. *General Motors*, —— S.E.2d ————, (decided July 1991) and attached to this testimony as an exhibit. Blankenship adopted the "crashworthiness" doctrine in automobile collision cases in West Virginia. In Blankenship I wrote for a unanimous court:

> [W]e do not claim that our adoption of rules liberal to the plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of the national law in terms of appropriate trade-offs among employment, research, development and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.—Slip Opinion at p. 11.

Thus, as a state judge I have admitted in a unanimous opinion written for the highest court of one of the fifty states that we, as a state court, cannot be rational in the crafting of product liability rules. No matter then, how responsible I or the other members of our court want to be as state court judges, we are powerless to improve the overall American productliability system or reduce the exposure of West Virginia manufacturers to the caprice or malice of out-of-state courts and juries.

By trying unilaterally to make such improvements, we will succeed only in impoverishing our own State's residents without doing anyone, anywhere, any measurable good. Unless we want to be "suckers," as state judges we must immediately incorporate the latest pro-plaintiff wealth redistribution theories applied in other states into West Virginia's decisional law. If we conceive and apply new wealth redistribution theories before anyone else, we can even garner for ourselves more than our fair share of the national product liability insurance pool. Every jurisdiction, then, must ultimately follow the most irresponsible state.

In the twenty years between 1970 and 1990, product liability went from an "innovative theory," not even recognized by a majority of states, to a multi-billion dollar business hazard. Thus, federalism's dynamics have not only created the current system, but more important, federalism's dynamics will inevitably create a bigger and more horrible system in the next decade.

Obviously the solution to this "competitive race to the bottom" problem is national product liability law. Inevitably, a statute like S. 640 will be refined by the Supreme Court of the United States as concrete cases present themselves. Indeed, the same competitive race to the bottom that exists in product liability would also exist in state taxation of interstate commerce had not the Supreme Court of the United States intervened in the 19th century. Left to themselves, all states would tax out-of-state products more heavily than in-state products, but the Supreme Court won't permit it. Roughly three percent of the Supreme Court's docket is devoted to tax discrimination cases. Therefore, there is strong precedent for Supreme Court supervision of product liability where we have a problem almost identical in profile to the tax discrimination problem. Furthermore, no reasonable commentator has said that federal supervision of tax discrimination matters in any way confounds the federal spirit of our Constitution.

There is little political support for a general roll back of product liability. However, freezing most parts of the current system and tinkering at the edges to reduce product liability's chilling effect on research, development and innovation should be welcomed by the political middle. Although S. 640 addresses only a few issues, it does deal with important matters such as punitive damages; product seller liability; joint and several liability; time limitations and the relationship between product liability and workers' compensation. While I might not have addressed each issue in the same way, I can appreciate that S. 640's architects have attempted to balance

the rights of injured people against the need to encourage innovation, local development of American products, and American competitiveness in international markets.

However, although I support S. 640 both in concept and in most of its particulars, I cannot fail to suggest one important amendment that I believe will make the bill more palatable to the middle and fairer.

What we really want to do in product cases is insure consumers against bad products. This insurance should protect against economic loss, give reasonable awards for non-economic loss, but most importantly, this insurance should pay the benefits quickly. In the current system, and at the most practical level, punitive damages have nothing to do with "punishing" the defendant; punitive damages are now used primarily to up the ante in a court system that is so complicated, expensive, overburdened, under-funded, and incompetent that final judgments typically take over eight years and lawyers are reluctant to take cases with less than six figure damage claims. Courts are not successful for the cases they try; courts are successful for the cases they do not try! Over 94 percent of all cases filed in court settle before trial, and there is no reason why these settlements cannot come sooner rather than later.

In the current system, punitive damages are used as an terrorem device to offset the enormous advantages that defendants have in terms of the logistical support for their lawyers, delay in the courts, and the necessitous circumstances of plaintiffs who must often settle for pittances because they need money today.

Finally, it should be pointed out that defendants and their lawyers are not the same entity. Although defendants themselves may be content with quick (and therefore cheap) settlements, that is not usually true for their lawyers, whose incomes these days are directly related to mindless file-building. Clients tend to trust their lawyers, so the counterproductive nature of most file-building is frequently either unnoticed or a matter of indifference. However, the availability of punitive damages that can be awarded in the discretion of a jury focuses the mind of corporate financial officers (if not corporate counsel) and helps inspire quicker settlements than would ordinarily be the case in the real world of hopelessly slow and complicated litigation.

S. 640 does an admirable job of beginning the transition to a new product liability paradigm where random, excessive lottery-like jury awards are traded for lower but quicker and surer settlements. This, obviously, is the purpose of Section 201, the bill's mechanism to encourage settlements. However, to help enforce both quick settlements and the voluntary use of alternative dispute resolution, I would amend Section 303(e) which sets forth the criteria justifying an award of punitive damages by adding a new subsection 10 in the following words:

> (10) the extent to which the manufacturer, when its liability was reasonably clear, exacerbated the original harm by failing to offer a reasonable settlement (or offer expeditious alternative dispute resolution) covering all losses otherwise allowed by state law, including some reasonable allocation for pre-trial attorneys' fees, within 90 days of the filing of the claim, or within such other, longer period as the court may specifically find reasonable in extraordinary cases after considering the complexity of the issues.

Thank you Mr. Chairman.

[*"In the Supreme Court of Appeals of West Virginia, January 1991 Term, No. 19949, Yvette Blankenship* v. *General Motors Corp. may be found in the committee's files.]*

Mr. SCHWARTZ. Let me now get very briefly to my statement. Last year, really, the focus of the debate was on three things. One was raised by a very experienced lawyer that Senator Hollings called down, and it concerned the alternative dispute resolution procedure. He made the point that putting a sanction on a plaintiff who does not want ADR could jeopardize his seventh amendment rights.

Well, that has now been totally turned around. There is no sanction on a plaintiff who decides not to go to ADR, and there is more to it than maybe we have already discussed because it allows the person a choice of using a ADR or not.

ADR's, at least in my experience, are good for plaintiffs when there are small claims. And a point that Ms. Gilbert makes, well

taken, is that people with smaller claims sometimes do not have access to our justice system.

So, under the bill, as revised, you will open up the courthouse, or at least the right to be heard, to people with smaller claims. And if they win at the ADR level, that really does create a lever for settlement that is not in the law today.

There is no State in the United States of America that has one-way ADR, where in essence the plaintiff has a choice whether to use it or not. But if the defendant does not use it, if the defendant in bad faith refuses, a sanction of legal costs is placed on him. That is a significant change, and many of the people I represent, I have to say, are not warm to it at all. But it is in the bill, and it is an attempt to put balance in the bill, so we continue to support it.

Another change that was made really came about because of a press conference that was held by Ralph Nader and other people. They felt that there was in imbalance in the incentives to settle provision. They felt that a plaintiff would have to pay the fees of some expensive law firm if indeed she lost the case, and the result would be to hammer her into making a settlement that was unfair.

A change that was made was to reduce the sanctions against a claimant to something that is very small, her collateral sources, which for nonlawyers are simply monies that she would receive in duplicate payments, and no more than that. But a defendant who turned down an offer to settle and was wrong could pay up to a $50,000 fine in legal fees if he made a mistake.

And this is also unprecedented in any State in the United States, which is these totally unbalanced sanctions of plaintiff against defendant, and it encourages settlement on both sides and I submit will save legal costs. It is a new incentive system placed in our law which will reduce legal costs.

The third change I have already mentioned, which is to see that a manufacturer of a pharmaceutical product does not just sit back with his premarket approval and then not submit relevant risk information to the FDA. They have to report it.

Another change that has not been mentioned addresses an opposition witness' concern about the bill leading to 50 different interpretations. And this is a bit legalistic, but what it says is that State courts are to follow the lead of the 11 Federal circuits in interpreting the law. That is what has been done since 1909 under the Federal Employers' Liability Act, and it has significantly reduced different interpretations in different States. We have an awfully long history on that fact.

There are other parts of the bill that have been gone over and over again. In the light of time, unless somebody has questions, I am not going to go into them. I just want to say that in a 12-year process this bill has been refined and rerefined. The probability of it being subject to 50 different interpretations is zero. It is a fair and balanced bill and really deserves a vote by the full Senate one way or the other.

Thank you very much.

[The prepared statement of Mr. Schwartz follows:]

PREPARED STATEMENT OF VICTOR E. SCHWARTZ

Mr. Chairman, thank you for your kind invitation to discuss S. 687, the Product Liability Fairness Act.

Some say that the history of this legislation is longer than that of the pyramids of Egypt, but there certainly is a difference. The pyramids have stood by the Nile for thousands of years, but have not changed. In the dozen years during which this bill has evolved, there have been substantial changes, and they are important. There have been changes in wording so when S. 687 becomes law, there will be few controversies about its meaning. But, more importantly, there have been changes in substance to assure that it is fair to all Americans. I am going to focus on those changes today because they are pivotal and meaningful. I will also very briefly outline the content of the legislation. First, let me summarize the basis of why this bill is here and why it should be enacted into law.

THE NEED FOR S. 687. THE PRODUCT LIABILITY FAIRNESS ACT

In the past dozen years, over a dozen states have passed some form of product liability legislation. All this legislation is different and it has continued the Tower of Babel style product liability law we have in the United States. In spite of arguments to the contrary, product liability in the United States is not uniform. Nevertheless, products are uniform, and standards of and for safety should have uniformity. The Europeans have recognized that both the needs of safety and commercial necessity prompt the need for uniform product liability law. The EC Directive is now law in almost all of Europe. Last July, the Country of Australia, with only six states and two territories, enacted uniform product liability law. In the United States, over 70 percent of goods that are manufactured in a state are shipped out of the state. For that reason, state product liability legislation has less than a 30 percent "effectiveness" standard. While the enactment of product liability law in individual states can be very helpful, product liability has become a matter of interstate commerce. Almost every commercial entity, including insurers who set rates on a nationwide basis, have recognized this fact. It is time for Congress to do so.

The absence of uniformity, as other witnesses will detail, spawns uncertainty. When product liability rules are made by courts, they are applied on a retroactive basis. This is unfair to both consumers and manufacturers. On one hand consumers can never be sure of their rights; on the other hand, manufacturers can never be certain that their products will not result in some type of a bizarre lawsuit.

THE THREE CORE CONCERNS OF CONTROVERSY IN THE 102ND CONGRESS—DEBATE ABOUT PRODUCT LIABILITY

In the debate about product liability in the 102nd Congress before this Committee and on the Floor of the United States Senate, there were three key areas of controversy.

A. First Principal Criticism

Mr. Chairman, you expressed deep concern about the Alternative Dispute Resolution (ADR) procedure set forth in S. 640, the bill in the 102nd Congress. While the results of the ADR procedure in S. 640 could be overturned in a jury trial, a penalty was imposed on either claimant or defendant if their rejection of the procedure was "unreasonable or not in good faith". Your concern was that this approach might deny a claimant's right to jury trial. In this year's bill no penalty is placed on a claimant who refuses ADR. On the other hand, if the defendant makes a bad faith refusal to participate in ADR, it can be penalized for the attorneys' fees that are generated by this failure. Any objective evaluation demonstrates that this provision has now been made decisively pro-consumer.

In that regard, a principal concern of the consumer community has been based on the assertion that persons who have smaller claims, , under $100,000, may be shut out of court. Under this provision, a claimant with a legitimate "lower damage" claim can proceed to ADR, which is cheaper, because it is informal in nature and does not require large expenditures for expert witnesses and extensive discovery. It will open the door for such claims throughout the United States. Currently, no state in America has a "one-way ADR provision". It is only contained in S. 687.

B. Second Principal Criticism

The second concern expressed (most forcefully expressed by a press conference held by Ralph Nader on September 8, 1992), focused on the Expedited Product Liability Claim procedure. The purpose of this procedure was to encourage both parties to settle cases before trial, certainly a goal that would be subscribed to by all rational persons. The consumer community concern focused on penalties that might

be placed on a claimant who refused an offer of judgment and was incorrect in that refusal, i.e., they were offered $100,000 to settle a claim and did not do as well in court. Some believed that the prior bill, S. 640, would have made a claimant bear a defendant's legal costs in that situation. Obviously, with the cost of litigation today that could be a very substantial amount. The concern further was that such a harsh penalty might hammer claimants into settling cases for insufficient amounts.

That concern has been met and abated in S. 687. If a claimant incorrectly refuses an offer of judgment, i.e., the offer is a good one, and the claimant does not do better at trial, the maximum amount of a penalty on a claimant will be "collateral sources" he or she received. Collateral sources are payments that the claimant has already received for his or her injury from a source other than defendant. For example, if a claimant had been paid by his employer, and that was an element of damage, the worst penalty that could be imposed on a claimant would be the amount of duplicate payment that the claimant received.

On the other hand, if a defendant turns down a claimant's offer of judgment, and the defendant did not do better at trial, it could be subject to a penalty of the claimant's reasonable legal costs up to $50,000. Any objective person would see that there is a significant imbalance of punishment with regard to sanctions for turning down reasonable offers, but the approach comports with the fact that most claimants cannot afford to pay a defendant's legal fees. This new approach gives claimants a new and important weapon to foster settlement, a weapon that is not available in any state or in the Federal courts today. Neither the Federal Rules of Civil Procedure, nor most state procedural codes allow a claimant to make an offer of settlement and then impose harsh penalties on a defendant who refuses the offer and does not do better at trial.

C. Third Principal Criticism

The third principal criticism of the bill in the 102nd Congress focused on the portion of the punitive damages provision that protected pharmaceutical companies from punitive damages if they met FDA standards of pre-market approval. Consumer groups suggested that companies might obtain pre-market approval (or in the case of aircraft, FAA pre-market certification) and then sit back and enjoy the benefits of that approval knowing that they would be forever immune from punitive damages. To make crystal clear that this situation would never be permitted, S. 687 requires a continuing obligation to report information to the FDA or FAA when it would be required by regulatory procedure, including adverse risk reaction.

With all the assertions made about this provision, it is interesting to note that one cannot find a real example where a drug company deserving of punitive damages would avoid being penalized under the new approach. Plaintiffs' counsel allegations in breast implant, Shiley Heart Valve and other cases have been that the companies hid information from the public and regulatory bodies. This conduct would remove their "shield" under S. 687. Regardless, cases involving older medical devices, such as breast implants and Shiley Heart Valves would not even come under the FDA provision because, in many cases, these medical devices never received FDA approval.

OTHER KEY PROVISIONS OF S. 687

A. Standards for Product Seller Liability

Product sellers are held liable in less than 5 percent of product liability actions; nevertheless, they are drawn into the overwhelming majority of product liability cases. This is because about 34 states treat product sellers as if they manufactured the product—they are absolutely liable for a manufacturer's mistakes. The net result is wasted time for small business and, also, wasted expense on lawyers, passed on to the consumer in the form of unnecessary higher prices.

S. 687 will improve this situation. Product sellers will no longer be subject to absolute liability; they will be liable only for their own negligence or fault. S.687 will eliminate product sellers being needlessly brought into product liability lawsuits. There are key exceptions to the general rule: where a manufacturer cannot be brought into court in the state or if it lacks the funds to pay a judgment, the product seller will have to bear responsibility for the manufacturer's conduct. There is a sound social policy behind this provision—it will encourage product sellers to deal with responsible (often domestic) manufacturers who do business in the state and have assets.

B. Alcohol and Drug Defense

In about 13 states people can recover in product liability actions even though a substantial cause of an accident was the fact that the claimant was inebriated or

under the influence of illegal drugs. S. 687 will put an end to that ridiculous situation: if the principal cause of an accident is the claimant's abuse of alcohol or illicit drugs, the claimant cannot recover.

C. Punitive Damages

During most of this country's history, punitive damages were relatively unimportant. They were confined to a few intentional torts and never exceeded awards for compensatory damages. Beginning in the mid-1970's, all of this changed. Punitive damages skyrocketed, and the standards for allowing them changed in a number of jurisdictions.

The United States Supreme Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 111 S. Ct. 1032 (1991), indicated that the Due Process Clause of the Constitution requires that fairness apply in the law of punitive damages. Unfortunately, the Court did not spell out any clear guidelines this year when it faced the question again in *TXO Production Corp.* v. *Alliance Resources, Inc.*, No. 92-479 (U.S. June 25, 1993). The case dealt with an issue that is addressed in S. 687 and that is simply "how much is too much?" spawned four separate opinions and was a plurality decision. The one thing that was clear was that punitive damage standards would have to be set by legislatures. In the area of product liability, for reasons stated, the Congress is the appropriate body to act.

S. 687 is modest in its approach and follows recommendations that have been put forward by a five-year Reporters' Study of the prestigious American Law Institute, as well as the American College of Trial Lawyers, a group of experienced plaintiff and defense bar trial attorneys. Several of the provisions have also been sponsored by the American Bar Association.

In a nutshell, first, S. 687 would raise the burden of proof in punitive damage cases from a "preponderance of evidence" to "clear and convincing." This is now the rule in 24 states. The burden of proof reflects the quasi-criminal nature of punitive damages, but is lower than the criminal law's "beyond a reasonable doubt" standard.

Second, S. 687 would make it possible for a defendant to elect to be tried on punitive damages liability only after his or her liability for compensatory damages has been established. The reason for this provision is to prevent the introduction of inflammatory and prejudicial evidence, relevant only to the issue of punitive damages, i.e., the net worth of the defendant, in the compensatory part of the trial.

Third, S. 687 would set forth a clear standard for proving punitive damages, which is "conscious, flagrant indifference" to public safety. Some states have very muddled standards that are both hard to understand and to apply. This standard is substantially similar to the standard used by many states and reflects the "ill will" requirement traditionally used in punitive damages law.

Finally, S. 687 would establish a defense against punitive damages for drugs and medical devices that receive pre-market FDA approval and aircraft and aircraft components that receive pre-market FAA certification. This benefit will apply only when there was no fraud in obtaining the approval and no bribery of FDA/FAA officials. As I have indicated, S. 687 makes clear that a drug (or aircraft) company can benefit from this provision only if it provides continuing appropriate adverse risk reports to the FDA/FAA. Recently, two Federal Courts of Appeals, the First and Fifth Circuits, have recognized the public policy behind this defense. See *Stamps* v. *Collagen Corporation*, 984 F.2d 1416, 1421-22 (5th Cir. 1993); *King* v. *Collagen Corporation*, 983 F.2d 1130, 1132-37 (1st Cir. 1993). These courts, in litigation involving a Class III medial device, have even gone beyond the scope of the defense in this bill and have ruled that FDA pre-market approval serves as a shield against any damages liability, punitive or compensatory.

D. Joint Liability for Non-Economic Damages

There has been a swirl of legislative activity on the topic of joint liability in state legislatures. Joint liability makes one person responsible in full for what somebody else did. There have been many different approaches to reforming joint liability—the bills select an approach that has been used in California since 1986 and was most recently adopted in Nebraska in 1990. The hallmark of the approach is its basic fairness. It abolishes joint liability for "non-economic damages" (pain and suffering, emotional distress). Each defendant will, however, be liable for non-economic damages in proportion to the defendant's share of responsibility for the harm. Non-economic damages are based on fault; it makes no sense for someone who is 25 percent at fault to bear 100 percent of the cost of non-economic damages.

An argument can be made that economic damages should be subject to joint liability. The argument is, in essence, a "no-fault argument" predicated on the fact that the defendant was at least partially responsible for the harm, and might be a better

"risk absorber" than the claimant. S. 687 would allow states to continue to award joint liability for economic damages.

E. Time Limitations on Liability

S. 687 has two provisions setting time limitations on liability. One provision, a "discovery" rule statute of limitations, helps consumers by preserving their right to sue until a person discovers or should have discovered both the harm, i.e., cancer, and its cause, i.e., asbestos. Some states, such as Virginia, cut off lawsuits before an injury manifests itself. Other states have a cut off as soon as a person discovers a harm, even though its cause was not discovered. This "discovery provision" in the bills would also apply in death cases; this would benefit claimants in a number of states which use a "time of death" rule in wrongful death actions.

S. 687 also contains a moderate statute of repose which places an outer time limit on litigation involving work place capital goods that are over 25 years old. This past year, the State of Texas enacted a statute of repose for workplace capital goods for fifteen years.[1] As one might expect, there are very few cases involving products older than twenty-five years; they are generally won by defendants. Nevertheless, cases involving very old machine tools bring about substantial legal costs and put American machine tool builders at a disadvantage with foreign competitors. Foreign competitors do not have machines in this country that are 60-70 years old, and so they pay less liability insurance than their American competitors.

F. The Relationship Between Workers' Compensation Offset and Product Liability

Almost everyone agrees there is a need to create better incentives to promote safety in the work place. Unfortunately, the current interaction between workers' compensation and product liability law does not foster that goal. Consider the current situation in most states. An employer can cause a work place accident by, for example, removing a guard from the machine causing a worker to be injured. If the worker then brings a lawsuit against the machine tool builder, the employer can join in the action (by what is called a subrogation lien). If the worker's suit is successful, the employer can recover all of the money it paid in workers' compensation. This recovery can be obtained even though the employer was a principal cause of the basic accident!

Under the approach in S. 687, a manufacturer would have an opportunity to abrogate the subrogation lien if it proved, by clear and convincing evidence, that the accident occurred because of the fault of the employer. If the manufacturer fails to prove this, it will have to bear the reasonable legal expenses borne by the employer in defending its lien.

CONCLUSION

I would anticipate the opponents of S. 687 will now develop new arguments against its content. do-sponsors of this bill, especially Senators Rockefeller, Lieberman, Dodd, Danforth, and Gorton, have acted in good faith in addressing the issues that were of concern to consumers and other opponents. That spirit of compromise has been a continuing history of this legislation.[2] The legislative process of give and take has produced a work product that certainly would not be one originating from any single interest group; rather, its purpose and content are designed to reduce unnecessary legal costs, encourage sound innovation, and the production of safe products. Last September, fifty-eight Senators said they would go forward and vote on the prior bill without the major modifications that I have highlighted today. We have reached the point where there should be a resolution on the merits of this legislation. If our democratic process is to have practical and fair meaning, it will take place now, in this Congress. S. 687's enactment will benefit all who are affected by our current confusing and problem-filled product liability system, consumers, manufacturers and product sellers alike.

ATTACHMENT A—CHANGES MADE IN THE FEDERAL PRODUCT LIABILITY BILLS 1981 TO 1993 (S. 687)

The Product Liability Fairness Act, which was introduced by Senators Rockefeller, Corton, Lieberman, Danforth and Dodd on March 31, 1993, and which now enjoys forty cosponsors in the United States Senate, is the result of a decade of thorough hearings, careful analyses, negotiations, compromises, and refinements by commit-

[1] S. 687 would expand a claimant's right to sue in Texas by ten years.

[2] I have included, as Attachment A, many of the major changes that have been made over the past dozen years to meet consumer concerns.

tees in both the Senate and House of Representatives. S. 687 bears minimal resemblance to the pro-defendant product liability bills initially supported by business groups in the early 1980's. The following are the principal changes that have been made over the years:

Principal Matters Eliminated From S. 687

- It does not restore negligence as the basis of liability for manufacturers. In fact, it no longer preempts state law standards of liability for manufacturers.
- It does not create a "state-of-the-art" defense for manufacturers.
- It does not create a defense for manufacturers of products that are "inherently dangerous" or "unavoidably unsafe."
- It does not modify or eliminate the doctrine of collateral estoppel (which permits a new plaintiff to utilize a result against a defendant from a prior case the defendant lost).
- It does not require the claimant to identify the manufacturer of the product that injured him or her.
- It does not contain any caps on damage awards.
- It does not create a defense against liability for products that comply with government standards.
- It does not preclude courts from allowing evidence about product improvements to be admitted in cases.
- It does not limit the amount of punitive damages awards, it does not limit multiple punitive damages awards from being imposed on a manufacturer for the same product, and it does not take away the jury's right to decide punitive damage awards.
- It does not contain a broad statute of repose for consumer products.

Modifications of Matters Contained in the Bill

- The 25-year statute of repose for capital goods products has been narrowed, so that it only operates to bar a claim if the claimant is eligible to receive workers' compensation benefits for the harm.
- The workers' compensation offset provision has been modified at the request of small business groups, so that employers will be able to retain their subrogation lien if they were not at fault in causing the claimant's injury and so that employers will be provided notice when a product liability case is filed and will be given an opportunity to intervene in the case to prove that they were not at fault.
- The product seller provision has been modified so that product sellers bear manufacturer liability if an injured person cannot obtain jurisdiction over the manufacturer in the injured person's home state.
- Pharmaceutical companies will not benefit from the FDA defense against punitive damages if they withheld material information from the FDA or if they bribed an FDA official.
- Joint liability is eliminated only for pain and suffering damages, not economic losses.
- The section dealing with expedited settlements has been changed to sharply limit economic sanctions on claimants.
- The section dealing with alternative dispute resolution has been changed to eliminate sanctions against claimants.
- The section establishing standards for punitive damages has been changed to clarify that drug companies that gain pre-market approval by the FDA will lose their defense to punitive damages if the company fails to make appropriate post-approval reports.

Provision Added at Request of Consumer Groups

- A discovery rule statute of limitations was added that will preserve a claimant's right to sue until he or she knows, or through reasonable diligence should know, both that he or she has been harmed and the cause of the harm. The provision would apply in both personal injury and wrongful death cases. Many states today in wrongful death cases automatically cut off a survivor's right to sue one or two years after the death occurred. The bill will preserve the survivor's right to sue until two years from when the cause of death is discovered.

Senator BRYAN. Thank you very much, Mr. Schwartz. We appreciate that analysis. We will next hear from Ms. Gilbert.

STATEMENT OF PAMELA GILBERT, DIRECTOR, CONGRESS WATCH

Ms. GILBERT. Good morning. Thank you, Mr. Chairman, members of the subcommittee. I am Pamela Gilbert. I am the director of Public Citizen's Congress Watch. Public Citizen was founded by Ralph Nader in 1971, and we are a national consumer organization with over 140,000 members nationwide. Congress Watch is the lobbying arm of Public Citizen.

Thank you for inviting me to present the consumer perspective on product liability and particularly on S. 687, the Product Liability Fairness Act.

For over a decade the U.S. consumer movement, in alliance with labor unions, women's and senior citizen's organizations, health and victim's groups, and the environmental community has been battling an effort by the world's largest manufacturers to limit corporate responsibility for unsafe products.

I have personally been involved in this debate for over 9 years now, and what I have witnesses is frankly perplexing and somewhat perverse, for even as more and more data is developed every year debunking the myths upon which Federal product liability legislation is based and, tragically, as new examples of the mass-marketing of dangerous and defective products arise every year, the campaign to limit victim's rights appears to grow stronger.

The vast array of businesses and insurance companies supporting product liability legislation has used its massive arsenal of lobbyists, public relations firms, political action committees, and special access, and influence to convince Government officials, opinion leaders, and the public itself that the product liability system has run amok and is harming the American economy. But in fact, nothing could be further from the truth.

Data submitted recently to State insurance departments from the insurance industry itself indicates that the total cost of product liability lawsuits in 1991 was no more than two-fifths of 1 percent of total U.S. product retail sales.

I would like to introduce for the record a report that was issued by the National Insurance Consumer Organization entitled "Product Liability 1991 Calendar Year Experiences" that analyzes this newly released data and concludes that manufacturers have been greatly exaggerating the impact of lawsuits on product costs.

Senator BRYAN. We will receive that report.

[The information referred to follows:]

PRODUCT LIABILITY: 1991 CALENDAR YEAR EXPERIENCE

(by the National Insurance Consumer Organization)

1991 was the first year that Product Liability Experience was required to be reported as a separate insurance line in the Insurance Expense Exhibit of the National Association of Insurance Commissioners (NAIC). This report analyzes, for the first time, the national experience of insurance companies in this line.

In this analysis, we will look at several issues:

- Overall profitability
- Key ratios
- Overall efficiency/cost
- The size of Product Liability premium written by insurance companies relative to the sales of products
- Attorney costs

- Claim payout analysis

SOURCE OF DATA—METHOD—DEFINITION

Attached Table 1 exhibit shows the experience of all insurance companies in the United States that report experience to A. M. Best and Company (at least 99 percent of all data from insurance companies is contained in this report). These data are for Calendar Year 1991, the first year for which such data have been required to be reported by the NAIC. The source of the data are the Insurance Expense Exhibits of the insurers which have been totalled by A. M. Best and Company and which has just been released with the publication of Best's Aggregates and Averages 1992 edition.

What is shown on the attached Table 1 is "direct" experience; that is, before reinsurance impacts. "Direct" is what the policyholder pays in premium and the actual losses that the policyholder incurs. Thus, this exhibit shows the results from the perspective of the insurance buyer. The insurance company result may be somewhat different because the insurance company secures reinsurance to "lay off" part of the risk so that, in years of high losses, the reinsured result is better than the direct result; in years of low loss, the opposite is true.

A word is necessary about Line (2), "losses incurred." This is not paid losses. it includes the insurers best estimates of losses it will pay in the future not only on claims it knows of, but on claims that may have happened but are not yet reported (so-called "Incurred-But-Not-Reported," IBNR). Thus, the losses displayed on the exhibit, as well as the expense1 are the insurer's best estimate of what, many years from now, will actually be paid out by them.

OVERALL PROFITABILITY

Product Liability insurance in 1991 was profitable to insurers. Before dividends to policyholders (presumably by more profitable than average insurers) of 0.3 percent, the pre-tax income was 7.4 percent of premium which translates to about 14.8 percent of equity assuming the usual 2:1 premium to equity ratio. This includes all investment income on surplus and reserves, but does not include any capital gains or losses realized by insurers. After federal taxes, insurers earned 5.9 percent of premium or about 11.8 percent on investment. This is a reasonable return for this insurance.

KEY RATIOS

For every dollar of premium earned in 1991, insurers expect to ultimately pay out 60.2 cents in losses to claimants.

Total expenses of insurers are 65.6 cents of every dollar of premium; thus, insurers internal costs—defense and overhead—is greater than the expected payout to victims. For every dollar that will go to victims, $1.09 will go the insurance executives, agents and attorneys, according to the 1991 data.

Investment income is anticipated to be 33.2 cents for each dollar of premium, 26.7 cents from investment of policyholder supplied funds held in reserve by the insurers. The balance, 6.5 cents comes from investment of surplus backing up the insurance transaction and other income.

OVERALL EFFICIENCY/COST

Product Liability insurance provided by insurers is very inefficient. Total costs of $1.09 in insurance overhead to deliver $1.00 of benefits to victims of injury from products is wasteful. Insurers should reduce their cost levels in this line of insurance, as they are now striving to do in auto and health insurance, other lines where they spend too much to deliver benefits. A major source of cost reduction could be achieved by emphasis on injury prevention.

THE SIZE OF PRODUCT LIABILITY INSURANCE PREMIUM WRITTEN RELATIVE TO SALES OF PRODUCTS

In 1991, the retail sales of products in the United States totalled $1,842,739,000,000.[1] The premium paid to insurance companies for product liability insurance totalled $2,598,589,000. Thus, product liability insurance premium costs, as a percentage of total sales, was 0.14 percent (fourteen one-hundredths of one percent). Thus, total elimination of product liability Insurance costs would save only 0.14 percent (fourteen one-hundredths of one percent) of the cost of products.

[1] Source: Bureau of Census, U.S. Department of Commerce. Telephone call of August 12, 1992.

It is to be noted that these product liability insurance statistics are only for commercially insured products. Some products are self-insured. The industry rule of thumb for 1991 was that 32 percent of property/casualty risk was funded by other than commercial insurance (22.2 percent self-insurance, 3.8 percent excess/surplus and 6.0 percent by other mechanisms such as captives, risk retention groups, etc.[2]). If that is the case, then the cost of insuring product liability is 0.21 percent (0.14 percent / 0.68). This is one-fifth of one percent! Even if only one-third of the product liability risk is commercially insured (a ridiculously low estimate), then the cost to American businesses for product liability insurance would be 0.42 percent (0.14/ 0.33). This is well under one-half of one percent of retail sales, a very low amount to care for those victims of product mishaps who file claims.

DEFENSE ATTORNEY COSTS VS. PLAINTIFF ATTORNEY COSTS

According to statistics provided by A. M. Best, loss adjustment expenses In 1991 were $1,068 million, of which about 85 percent was for defense attorneys. Thus, insurers paid or expect to pay their attorneys about $908 million. Assuming that plaintiff attorneys have been or will be paid ⅓ of incurred losses, plaintiff attorneys will earn $521 million. This means for every dollar earned by a victim's attorney, defense attorneys earned $1.74 in 1991. This makes sense since defense attorneys get their hourly fees even if they lose, whereas plaintiff's attorneys, who lose over half the time in products cases, get nothing when they lose.

CLAIM PAYOUTS

Table 2 shows all claims laid for all claims incurred over the last 10 years on all insured product liability injuries through year end 1991. Column (1) shows the dollars actually paid out for each year on a cumulative basis including all payments through December 31, 1991; Column (2) shows the number of claims closed with a payment to the claimant; Column (3) shows the number of claims closed with no payment to a claimant; Column (4) shows the average payment for each claim with a payout to a victim; Column (5) shows the average payout per closed claim, including claims closed without payment.

Several important things can be concluded from this table:

a) Under 56,000 persons per year on average (or about 1,100 people per state, per year) collected product liability claims during the last decade out of a population of about 250 million Americans.

b) For each 100 persons who were paid something on claims during the last ten years, 128 persons who filed a claim received nothing when the claim was closed.

c) The average claim paid for product injuries incurred in the decade was $8,577 when you include all claims closed with a payment to a victim; the average claim settled for all claims including those with no payment was $3,767.

d) When data on claims closed on incidents of injury earlier than the past decade are included In the 10 year results, the average claim settled with or without payment averaged $4,152 (this is because slower settling claims are somewhat bigger in size than the fast settling claims. It is interesting the note that on these older claims, three out of four claims are closed for no payment.)

e) For each claim they brought over the last 10 years, the average plaintiff attorney received an estimated $1,256 while the typical defense attorney got about $2,028 for each claim handled.

f) Although the Table appears to show declining average payments in recent years, this is not necessarily the case, since smaller claims are settled earlier. There is no evidence, either, of any significant growth in the number of or size of insured claims over the past decade.

Table 1—Product Liability Calendar Year 1991 Experience, All Insurance Companies, Countrywide Data

		Percent of earned premium
1. Premium Earned	$2,598,589,000	100.0
2. Losses Incurred	1,564,311,000	60.2
3. Total Expense incurred[1] (Other Than Losses)	1,705,719,000	65.6
4. Investment Gain (Loss) from Reserves	695,059,000	26.7
5. Other income (Loss)	(22,048,000)	(0.8)

[2] Source: Business Insurance January 28, 1991, Page 3.

Table 1—Product Liability Calendar Year 1991 Experience, All Insurance Companies, Countrywide Data—Continued

		Percent of earned premium
6. Dividends to Policyholders	8,028,000	0.3
7. Investment Gain from Surplus [2]	190,996,000	7.3
8. Total Investment and Other Gain (4+5+7)	864,007,000	33.2
9. Pre-Tax income (Pre-Dividend) (1—2—3+8)	192,566,000	7.4
10. Pre-Tax income (Post-Dividend (9—6)	184,538,000	7.1
11. Post-Tax income (Post-Dividend) [3]	153,167,000	5.9

Source: Insurance Expense Exhibits, A. M. Best & Co., Aggregates and Averages, 1992 Edition, Page 132. Pre-reinsurance results.

[1] The breakout of these costs is as follows: claims adjustment $1,068 million, commissions to agents $273 million, state taxes $66 million, general overhead and advertising/sales costs $298 million.

[2] Estimated. Premium to surplus ratio of 2:1 assumed. Yield based upon Best's data for 1992 found on Page 133 of Aggregates and Averages. 1992 Edition.

[3] 1991 Tax rate—17 percent, calculated from Page 3 of Best's Aggregates and Averages. 1992 Edition.

Table 2—Product Liability Insurance Total U.S. Experience Claims Incurred in Past Decade

Year in which losses were incurred	(1) Cumulative paid losses and defense lawyer costs (000)	(2) No. of claims closed with payment	(3) No. of claims closed without payment	(4) Average payout per closed claim with payment[1]	(5) Average payout per closed claim
1982	$943,316	64,525	102,687	$14,619	$5,641
1983	1,033,765	67,068	85,490	15,414	6,776
1984	1,097,869	72,295	90,819	15,186	6,731
1985	1,066,652	68,167	76,903	15,648	7,353
1986	978,806	53,811	77,638	18,190	7,446
1987	729,495	52,770	79,757	13,824	5,505
1988	661,341	57,794	63,281	11,443	5,462
1989	497,061	51,690	58,273	9,616	4,520
1990	260,440	44,623	48,122	5,836	2,808
1991	102,397	25,908	30,296	3,952	1,822
Total	7,371,142	558,651	713,266	13,195	5,795
Average Payment to Victim [1]				8,577	3,767
Average Payment to Defense Attorney [1]				4,618	2,028
Average Payment to Victim's Attorney [2]				2,859	1,256

[1] 35 percent of Payout=Defense Attorney Fee based on paid data from Best's Aggregates and Averages, Page 117, 1992 edition.

[2] Assumes 33.3 percent plaintiff Fee on Payment to Insured

Notes: (1) These data do not permit calculation of median payouts (2) There were also 487,127 claims closed during the decade from incidents prior to the decade of which 24 percent received a payment and 76 percent received nothing. If these claims are included the total average payment per closed claim in Column 5 changes from $5,795 to $6,387 and the average payment to the victim was $4,152.

Source: A. M. Best Aggregates and Averages, 1992 Edition, Page 123

Ms. GILBERT. Furthermore, according to the annual report of the National Center for State Courts, and I quote, "The evidence points to tort litigation growing more slowly than civil cases generally. It would appear that there is little evidence of an explosion in the types of cases that are the focus of most attention—medical malpractice and product liability."

In fact, in 1991, tort lawsuits, including automobile and other nonproduct-related cases declined about 1 percent. My written testimony discusses numerous other studies that debunk the myths that the product liability system is a drag on the economy.

Now, I would like to discuss some of the provisions of the bill itself. We have heard over and over again this morning, and over the course of the last couple of years, that S. 687 and its immediate predecessor is more moderate than previous product liability proposals. We must admit that that is true.

However, the legislation remains devoid of balance or fairness, and continues to favor manufacturers of defective products at the

expense of the victims of those products, and while some onerous provisions of prior bills have been removed, the provisions that remain could be devastating to product victims and to the safety of the public.

I want to discuss two of those provisions in particular and give you two stories of real, live product victims and how those provisions would have affected them. Before I do that, I want to strongly encourage the subcommittee to have another hearing and invite victims themselves to come and tell their stories. No one can tell you about the product liability system from the perspective of a consumer better than somebody who has had to go through it themselves.

But let me talk about a couple who came to Washington last year, right before the Senate vote on S. 640—28 product victims from 18 States came to Washington, DC, to hold a press conference and to lobby their Senators last year to ask them not to vote for S. 640.

Among these wonderful and unselfish people who came to Washington were a couple, Larry and Janey Fair from Radcliff, KY. Mr. and Mrs. Fair's daughter, Shannon, was killed in a 1988 schoolbus crash in Kentucky, in which 24 children and 3 adults were killed, and 12 others were seriously burned. The crash was caused by a driver who ran head-on into the bus, penetrating the fuel tank, which caught on fire.

According to experts, a heavy steel case surrounding the gas tank would have prevented the fire after the crash. The bus was built on March 23, 1977. If it had been built after April 1, 1977, just a couple of weeks later, Ford would have been required to put that cage on the bus. The Government would have required it.

The forensic pathologist who investigated the case found that none of the crash victims suffered fractures or other trauma from the crash. In other words, the fire, which would have been prevented by the protective cage that existed at the time but was not required at the time, the fire killed the victims, not the crash.

The Fairs sued Ford over the defectively designed gas tank, and after a 4-year litigation process Ford settled for an undisclosed sum.

Joint and several liability, which has been discussed on the prior panel, was developed to ensure fairness in cases precisely like the one brought by Mr. and Mrs. Fair. Under joint and several liability, when two or more parties are at fault for an injury, the injured victim can recover fully from either party.

Shannon Fair's death was caused by two parties, the driver who ran head on into the bus, and Ford, whose defectively designed gas tank caused the ensuing fire. If one of the parties had not acted in a negligent or reckless manner, Shannon Fair most likely would be alive today.

Under the majority rule of joint and several liability, the Fairs are able to recover all their damages from Ford because the driver was judgment proof. They were able to get all of their damages from Ford because Ford was jointly liable, because Ford was 100 percent responsible for the death.

Now, Shannon Fair was a child. She was not making any income, and she did not incur any medical expenses before she died. The

entire award to the Fairs was in noneconomic damages to compensate for the pain and suffering of losing their daughter. These losses, although admittedly intangible, are as real to the Fairs as any financial loss that they could suffer.

This is what Mrs. Fair said when she came to Washington last year, when she tried to describe her feelings: "It's difficult for me to explain to you what this does to a family, for the families have been devastated by this tragedy. We are not a family as we were then, and things will never be the same for us."

Under S. 687, the rule of joint and several liability would not have applied to the Fairs' pain and suffering damages, and Ford, the wrongdoer, would have escaped full liability, and the Fairs, the innocent victims, would not have received full compensation. This is the result of a provision that is in what is supposed to be a fair and moderate and balanced bill. I do not think the Fairs, Mr. and Mrs. Fair, would agree.

I see that my time is up. My testimony also discusses the FDA defense to punitive damages. Another victim who has come to Washington before to discuss that provision and has, in fact, written to the U.S. Senate in opposition to that provision, suffered greatly from a medical device that was put on the market, the Bjork-Shiley heart valve. His wife, who had the heart valve, was the victim of a fracture. The fracture killed her.

Mr. Barbee is very, very opposed to the FDA defense that is in the product liability bill. He believes that if the manufacturer of the Bjork-Shiley heart valve had been immune from punitive damages when he brought his case because of his wife's death, that he would not have gotten the settlement, the out-of-court settlement that he got. The living threat of punitive damages is what led to the settlement and more importantly, punitive damages have also led to taking dangerous products off the market and notifying the public of those dangers.

I want to end by reiterating our opposition to this legislation precisely because of the types of stories I have just relayed on how consumers would be affected by this legislation. In fact, I also want to explain that from the standpoint of consumers, the civil justice system is already skewed for defendants against consumers and injured victims.

We believe that the civil justice system should be expanded and strengthened, not restricted and weakened, as S. 687 would to, to better protect the American public. My written testimony includes a list of provisions that we would like to see that would strengthen the civil justice system for consumers.

I want to end by urging this committee to oppose and reject S. 687.

[The prepared statement of Ms. Gilbert follows:]

PREPARED STATEMENT OF PAMELA GILBERT

Mr. Chairman and members of the subcommittee, I am Pamela Gilbert, Director of Public Citizen's Congress Watch. Public Citizen, founded by Ralph Nader in 1971, is a national consumer organization with over 140,000 members nationwide. Congress Watch is the lobbying arm of Public Citizen.

Thank you for inviting me to present the consumer perspective on the issue of product liability, and more specifically, on S. 687, the "Product Liability Fairness Act. " For over a decade, the U.S. consumer movement, in alliance with labor unions, women's and senior citizens' organizations, health and victims' groups, and

the environmental community, has been battling an effort by the world's largest manufacturers to limit corporate responsibility for unsafe products. I have personally been involved in this debate for over nine years, and what I have witnessed during that time is, frankly, perplexing and perverse. For even as more and more data is developed debunking the myths upon which federal product liability legislation is based, and as new examples of the mass marketing of dangerous and defective products arise each year, the campaign to limit victims' rights appears to grow stronger!

The vast array of businesses and insurance companies supporting product liability legislation has used its massive arsenal of lobbyists, public relations firms, political action committees and special access to convince government officials, opinion leaders and the public that the product liability system has run amok and is harming the American economy. in fact, nothing could be further from the truth. Data submitted to state insurance departments from the insurance industry itself indicates that the total cost of product liability lawsuits in 1991 was no more than two-fifths of one percent of total U.S. product retail sales. (See attached, "Product Liability: 1991 Calendar Year Experience," a report by the National Insurance Consumer Organization, September, 1992.) And, according to the 1991 annual report of the National Center for State Courts, "The evidence points to tort litigation growing more slowly than civil cases generally * * * It would appear that there is little evidence of an 'explosion' in the types of cases that are the focus of most attention [medical malpractice and product liability]."

Now that there is hard evidence to refute claims that American competitiveness hinges on restricting product liability laws, the focus of the debate has shifted to lawyers, the group that Americans most love to hate. The nasty secret that usually goes unsaid is that paraplegics, burn victims and permanently disabled people whose lives are shattered by dangerous and defective products are the people who would be most adversely affected by S. 687 and other similar proposals.

In fact, S. 687 and its predecessors would barely put a dent in the incomes of lawyers, plaintiff or defense. If legislation is passed to make product liability cases more difficult to bring, or to limit the compensation awarded, these resourceful professionals will simply find other types of lawsuits to litigate. The people who will be directly harmed by this bill are the victims of dangerous produ6ts who cannot find an attorney to bring their cases, or who are undercompensated even when they do prevail in court. Ultimately, the biggest losers will be the American public, who will be faced with an even more dangerous marketplace and less information about those dangers.

THE PRODUCT LIABILITY SYSTEM BENEFITS CONSUMERS

U.S. product liability laws enable consumers who have been injured by dangerous and defective products to be compensated by the manufacturers of those products. But these laws do much more than that. Just consider the recent and ongoing saga of silicone-gel breast implants. In addition to compensating victims, lawsuits brought by women injured by silicone implants have:

- punished the manufacturers of the implants for selling the devices without adequate testing and without warning patients and doctors of the potential hazards;
- forced Dow Corning, the largest manufacturer of silicone implants, to stop making the devices; and
- uncovered evidence of the product's hazards that enabled the Food and Drug Administration (FDA) to place restrictions on the use of these dangerous devices.

In fact, it wasn't until a jury ordered Dow Corning to pay $6.5 million in punitive damages to a woman who developed serious auto-immune disease because of her implant that the FDA finally woke up and reacted to the safety hazards of the devices. If not for this product liability award, and the resulting publicity, the implants would probably still be on the market free from restrictions today.

In another example, the National Highway Traffic Safety Administration (NHTSA) has asked General Motors (GM) to recall its 1973-1987 line of full-size C/K pickup trucks with side-saddle fuel tanks because of their tendency to rupture and leak, leading to often-fatal res. The recall request came two months after an Atlanta jury ordered GM to pay over $4 million in compensatory damages and $101 million in punitive damages to the family of 17-year-old Shannon Moseley, who died in a fire following a crash in a GM pickup. (GM has so far refused to comply with the recall request.)

These stories are only the most recent illustrations of how the product liability system helps to compensate victims and prevent future deaths and injuries from dangerously defective products marketed by corporations that placed profits above consumer health and safety. Other defective products allowed on the market

through corporate indifference include the infamous Ford Pinto, A.H Robins' Dalkon Shield, and deadly asbestos. In all of these cases, the product liability system was indispensable to uncovering the wrongdoing and compensating the victims. Not surprisingly, the manufacturers of each of the products mentioned above belong to the coalition promoting S. 687.

S. 687 HURTS INJURED CONSUMERS

Proponents of S. 687 often claim that the bill is "more moderate" than previous product liability proposals. While this is true, the legislation remains devoid of balance or fairness, favoring manufacturers of defective products at the expense of the victims of those products. And while some onerous provisions of prior bills have been removed (although those provisions continue to be supported by business groups), the provisions that remain could be devastating to product victims and to the safety of the public.

Elimination of joint and several liability for pain and suffering damages

Last year, just prior to the Senate vote on product liability legislation, 28 product victims from 18 states traveled all the way to Washington, many at their own expense, to ask their Senators to oppose the legislation. Among these fine and unselfish citizens were Larry and Janey Fair from Radcliff, Kentucky. Mr. and Mrs. Fair's daughter Shannon was killed in a 1988 school bus crash in which 24 children and three adults were killed and 12 others were severely burned. The crash was caused by a driver who ran head on into the bus and penetrated the fuel tank, which caught on fire. According to experts, a heavy steel cage surrounding the gas tank would have prevented the fire after the crash. The bus was built on March 23, 1977. If it had been built after April 1, 1977, Ford would have been required by the government to put such a cage on. The forensic pathologist who investigated the case found that none of the crash victims suffered fractures or other trauma from the crash. In other words, the fire—which would have been prevented by the protective cage—killed the victims, not the crash. The Fairs sued Ford over the defectively-designed gas tank, and after a 4-year litigation process, Ford settled for an undisclosed sum.

If S. 687 had been the law when the Fairs brought their lawsuit, Ford would have received a windfall, and Mr. and Mrs. Fair would have been undercompensated for their terrible loss. This is due to one of the core provisions of S. 687, which would eliminate the doctrine of joint and several liability for "noneconomic," or pain and suffering, damages.

Joint and several liability was developed to ensure fairness in cases precisely like the one brought by Mr. and Mrs. Fair. Under joint and several liability, when two or more parties are at fault for an injury or death, the injured victim can recover fully from either party. Shannon Fair's death was caused by two parties—the driver who ran into the bus, and Ford, whose defectively-designed fuel tank caused the ensuing fire. If one of the parties had not been negligent or reckless, Shannon's death would have been prevented. In other words, each party was 100 percent responsible for her death. Under the majority rule of joint and several liability, the Fairs would be able to recover all their losses, even though the driver was judgment-proof, because Ford would be required to make up the shortfall.

Because Shannon Fair was a child who died without incurring medical expenses, most, if not all, of the payment to Mr. and Mrs. Fair was for "noneconomic" damages, to compensate for the suffering and devastation of the loss of their daughter. These losses, although intangible, are as real to the Fair family as any financial loss they could have suffered. Mrs. Fair tried to describe her own feelings when she came to Washington last year. She told the press, "It's difficult for me to explain to you what this does to a family, for we have a son left * * * For the families who have been devastated by this tragedy, we are not a family as we were then, and things will never be the same for us."

Under S. 687, the rule of joint and several liability would not have applied to the Fair's pain and suffering damages. Therefore, Ford would have escaped full liability for its misconduct, and the Fairs would not have received full compensation. In other words, S. 687 benefits corporate wrongdoers like Ford at the expense of victims, like Shannon Fair and her family. Imagine their surprise upon being told that supporters claim S. 687 is a "moderate" bill that helps consumers.

"FDA Excuse"

S. 687 shields manufacturers of drugs, medical devices and aircraft from punitive damage liability if the products have received approval from the Food and Drug Administration or the Federal Aviation Administration, even if the company engaged in outrageous misconduct against the public. As any observer of government knows,

even when they are fully staffed and fully funded, regulatory agencies are simply incapable of effectively policing the entire marketplace. Time and again, agencies have allowed dangerous products to be placed on the market and to remain there, even after the agency has learned of the product's dangers.

Fred Barbee of Minong, Wisconsin has first-hand knowledge of the failures of the regulatory process. Mr. Barbee's wife Carol died when her Bjork-Shiley heart valve, manufactured by a subsidiary of Pfizer, Inc., fractured. By the time of Mrs. Barbee's death, the heart valve was no longer being sold because of its tendency to fracture, and many lawsuits had already been settled by Pfizer. Unfortunately for the Barbees, Pfizer settled the lawsuits in secret, and did not warn other heart valve recipients of the product's problems.

The FDA had granted Pfizer approval to market the Bjork-Shiley convexo-concave heart valve in 1979 based on Pfizer's claim that the valve produced a lower rate of clotting problems than earlier valve models. Not only did the Shiley valve prove no better in preventing clotting problems, but it has since been disclosed that potentially fatal fractures had occurred during pre-clinical testing, prior to FDA approval. Despite their knowledge of these serious problems, Pfizer continued to market the valve until 1986, when the FDA threatened to withdraw approval of the product. More than 86,000 valves have been implanted worldwide, and the FDA documents at least 394 fractures that have led to over 250 deaths. Public Citizen estimates that approximately 900 deaths have occurred as a direct result of Shiley valve fractures, and at least one additional death results from the defect every month.

Carol Barbee's valve fractured and killed her in 1988, after Pfizer had settled many lawsuits involving valve fractures, requiring promises of confidentiality in return. Because of these secrecy agreements, Mr. and Mrs. Barbee and the doctors in the hospital they went to when the valve fractured were unaware of the Shiley valve's fracture problem. The doctors misdiagnosed Mrs. Barbee's problem, treating her for a heart attack rather than a fracture, and she died. Mr. Barbee has written to Congress in opposition to the "FDA excuse" provision:

> There is nothing about FDA approval of my wife's heart valve, or any other medical product, that should magically absolve the manufacturer from punitive damages when the manufacturer engages in willful and wanton disregard for human life. Carol's death is proof of that fact, because FDA approval did nothing but provide the vehicle to make this deadly product available to her doctor. I have certainly learned that FDA approval is no guarantee of safety of a product. Instead, I have learned that the FDA lacks staff and financial resources to even begin to monitor completely all of the vast products which fall within its jurisdiction. I have also learned that the tort system in our country provides a vehicle to keep manufacturers of all types of products honest, and that the award of punitive damages in those cases where manufacturers act unscrupulously has the effect of deterring other manufacturers from engaging in similar misconduct * * * *both my attorney and I are convinced that but for the threat of punitive damages which Shiley and Pfizer feared if the case was taken to trial the case could never have been settled for the amount we received.* (Emphasis added.)

THE PRODUCT LIABILITY SYSTEM SHOULD BE STRENGTHENED, NO WEAKENED

As advocates for the rights of consumers, we are unalterably opposed to provisions, like those mentioned above, that benefit manufacturers of dangerous and defective products at the expense of their victims. Our opposition to S. 687 is further strengthened by the experiences of the hundreds of thousands of product victims who cannot get adequate relief from the current system, which is already skewed against the interests of consumers. The fact is, the civil justice system should be expanded and strengthened, not restricted and weakened, to better protect the Amen can public.

Consumers rarely litigate

In 1991, the Rand Institute for Civil Justice released a report, "Compensation for Accidental Injuries in the United States," based on a survey of the claims experience of over 2500 injured individuals. (The study did not include injuries that resulted in fatalities or institutionalization, or that were caused by a pharmaceutical product, toxic substance, or work-related stress.) The results were startling, and extremely troubling for anyone who cares about the health, safety and financial well-being of the American public. From the survey, Rand estimates that the total annual nationwide cost of the types of non-fatal injuries studied is about $176 billion, or almost 4 percent of gross national product. Furthermore, according to the survey, injured Americans recover only about 60 percent of these losses through public and private sources, such as health insurance, workers' compensation, and the legal sys-

tem; they must shoulder 40 percent of their losses themselves, out of their own pockets. In the cases where there is a permanent disability, the situation for injured people is even more dismal—they recover only 20 percent of their losses from outside sources. Finally, only about 10 percent of the injury victims surveyed even attempted to bring a liability claim, which include informal demands and insurance claims, as well as lawsuits.

Victims of dangerous products do not pursue product liability claims for a number of reasons, including lack of education about the civil justice system, lack of appreciation that litigation is even available as an avenue of redress, or lack of understanding of the procedures for filing disputes. Others are deterred because they are reluctant to expose themselves and their families to the invasion of privacy involved in most court proceedings, and to the stresses and time commitment of the adversary process. Still others cannot find an attorney to take their cases, either because it would be too difficult to prove, or too costly. The most frequent action product victims take in response to their injuries is to do nothing.

Clearly, injured people are not reaping any sort of "windfall" from the product liability system or from other compensation systems. In fact, injured people must absorb and pay for much, if not most, of their injuries themselves. S. 687 would make this situation even worse.

Consumers with "small claims" are shut out of the system

The Rand report and other studies have shown that most victims of dangerous products do not bring a claim against the manufacturer. One reason for this low filing rate is the difficulty, time and expense involved in most product liability lawsuits. The claims are expensive and time-consuming largely because almost all of the documents and information needed to prove that a product is defectively designed are in the possession of the defendant manufacturer, who usually fights requests to give this information to the victim's attorney. Furthermore, because of secrecy agreements, even after this information is uncovered in a lawsuit, it is unavailable to subsequent victims of the same product, who must start from scratch in the long and costly discovery process.

Product liability lawsuits are brought under a contingency fee in which the plaintiff's attorney is paid by a portion of the award (and receives nothing if the case loses). Due to the expense and uncertainty of most product lawsuits, victims with relatively small damages are often unable to find attorneys to bring their cases—the lawsuits are simply too expensive to be financed on small fees. These victims, whose losses are great to them even though they are too small to sustain litigation, are shut out of the civil justice system. Alternatives to litigation are necessary to enable people with small product liability claims to recover compensation from manufacturers of defective products.

Although S. 687 includes provisions on pre-trial settlement and alternative dispute resolution, these provisions will not serve consumers' goal of expanding access to the product liability system. In fact, the settlement incentive system in the bill may chill access to the system rather than expand it. In order to benefit consumers, alternative systems for victims with small claims must be streamlined to ensure their affordability. Otherwise, the victims will be effectively barred from the system, just as they are shut out of the existing litigation system. Ideas for streamlining the system include: relaxing proof requirements, limiting or eliminating expert witness testimony, limiting discovery periods and methods, and limiting trial time. The system must be binding on the parties, or else defendants will appeal every decision, knowing that the plaintiff's damages cannot sustain a full-blown lawsuit. Finally, the small claims process should be voluntary on the part of the injured party—if that party can afford to bring a lawsuit, he or she should be entitled to do so.

Secrecy in the courtroom should be limited

Manufacturers of defective products routinely request and receive gag orders issued by a court to prevent any disclosure of information developed in the case that is not used in open trial. Since most cases settle before trial, particularly those where damaging information is developed, information about thousands of defective products is locked away. Fred Barbee's wife might be alive today if it weren't for the secrecy agreements in Shiley heart valve lawsuits that kept information about fracture problems from the public and the medical community for many years. Secrecy agreements also kept information from the public and government regulatory agencies about the hazards of asbestos, silicone-gel breast implants, the anti-pain drug Zomax, and many others. In addition, secrecy agreements add to the time and expense of lawsuits, because victims of dangerous products are forced to reinvent the wheel each time a lawsuit is brought, instead of sharing information that has already been disclosed in similar, previous cases.

Any reform of the product liability system should prohibit most secrecy agreements in lawsuits over defective products. Senator Herb Kohl (D-WI) recently introduced legislation (S. 1404) that addresses this serious problem. Although the legislation needs strengthening, it is a positive step forward in the debate over the effectiveness of the civil justice system in protecting the public from product hazards.

Federal health and safety regulation must not preempt product liability claims

Very recently, two of the twelve Federal Circuit Courts—the first and the fifth—ruled that the Medical Device Amendments to the Food, Drug and Cosmetic Act (FDCA) totally preempt state product liability claims for FDA-regulated medical devices. Both cases held that even where the manufacturer committed fraud on the FDA to obtain approval to sell their product, federal law preempts a civil suit for damages. These rulings could prohibit lawsuits by victims of such notable dangerous products as silicone-gel breast implants, Bjork-Shiley heart valve, and defective IUDs. Congress should amend the FDCA to specifically state that FDA regulation should not preempt any state product liability claims.

Product injuries should be prevented

Far too many consumers are injured and killed every year because of unsafe products. In fact, injury is the fourth leading cause of death overall, and the leading cause of death to children. A number of reforms are needed to prevent these costly tragedies from occurring in the first place, and to gather more information about hazardous products and their costs to society. In addition to the reforms mentioned above, Congress should:

Increase the effectiveness of federal regulatory agendas. S. 687 would put a tremendous responsibility on the Food and Drug Administration and the Federal Aviation Administration, making them virtually the only safeguard against corporate misconduct that produces dangerous drugs, medical devices and aircraft. The bill, however, does nothing to provide government agencies with the budgets, staffing levels and statutory authority necessary to make them more effective protectors of public safety.

Require the preservation of safety information. Corporations regularly destroy documents that discuss product hazards in order to escape potential liability. The destruction of corporate documents unfairly denies compensation to injured plaintiffs and results in prolonging and increasing the costs of litigation. Corporations should be required to retain for 25 years documents that assess product dangers. Companies that continue to destroy safety-relate information should be fined. When a plaintiff can show that documents have been destroyed, there should be a presumption that the destroyed documents proved liability.

Require insurance data collection. Insurance companies should report to the federal government information about how much they receive in premiums and how much they pay out on liability claims. This data is necessary to evaluate the effect that product liability claims have on rates.

Increase civil and criminal penalties. Federal agencies should have the authority to assess meaningful civil and criminal penalties against manufacturers for failure to report potential product hazards and for violation of safety regulations.

Require lawsuit reporting. Manufacturers should be required to report product liability lawsuits brought against them to the appropriate regulatory agencies.

Access to health care. Most important to the American public, Congress should establish a national health insurance system so that injured people are not forced to go to court on order to pay for their medical care.

MYTHS AND FACTS ABOUT THE PRODUCT LIABILITY SYSTEM

Proponents of S. 687 make a number of claims about our product liability system to support the need to reduce the rights of some of the most unfortunate and vulnerable members of society—those that have been seriously injured by the misconduct of wealthy corporations. But as Kenneth Jost, a journalist and adjunct professor at Georgetown University Law Center, wrote about last year's product liability bill in the April, 1992 issue of the American Bar Association Journal:

> [The bill is] the product of dubious anecdotes, questionable research, concocted statistics, factual and legal misstatements, and willful disregard of contradictory evidence.

Myth: There is an "explosion" in product liability lawsuits

Every study of the civil justice system, both in federal and state courts, refutes the charge that product liability lawsuits have been escalating out of control. Studies of the federal court system show that the only "explosion" in product liability lawsuits in federal courts was caused by the outrageous misconduct of asbestos

manufacturers and the A.H. Robins company, not by flaws in the civil justice system that will be cured by restricting victims' access to the courts:

- According to the General Accounting Office (GAO), from 1981 to 1986 the growth in product liability filings in federal court unrelated to asbestos, the Dalkon Shield and Bendectin averaged 4 percent per year—less than the 6 percent growth rate of all civil filings and the 5 percent rise in personal expenditures on goods.
- According to Professor Marc Galanter of the University of Wisconsin Law School, the number of product liability cases in federal courts, other than asbestos cases, has been shrinking steadily in recent years, falling 40 percent between 1985 and 1990.

These studies are consistent with findings from the state court system, compiled by the National Center for State Courts. Each year, the Center releases an annual report of statistics on court caseloads and trends in the criminal and civil state court systems. The 1991 annual report found:

- While tort filings in the state courts have increased by about 18 percent over the past seven years, most of the growth occurred between 1985 and 1986 (17 percent). There was little change between 1986 and 1989 (a drop of less than I percent). The number of filings increased slightly more than 2 percent between 1989 and 1990, and then declined about 1 percent in 1991.
- In recent years, tort litigation has grown more slowly than civil cases in general—the total number of civil filings grew by 2 percent between 1990 and 1991 while the number of tort filings fell by 1 percent.
- In the nine states that reported a breakdown of the tort caseload, nonautomobile tort filings, which include medical malpractice and product liability, decreased by 3 percent between 1986 and 1991, while automobile torts increased by 10 percent.

These and other studies also show that if there is any "explosion" happening in the courts, it is in the realm of commercial litigation, such as contracts and real estate, and family law, and not in cases brought by injured individuals seeking compensation:

- A study by Professors Marc Galanter and Joel Rogers found that, between 1979 and 1987, contract cases in the federal courts more than tripled, intellectual property cases nearly quadrupled, and business bankruptcy cases quadrupled.
- The National Center for State Courts reports that, between 1985 and 1991, tort filings increased by 18 percent, contract filings by 8 percent, and real property rights by 31 percent. Nationwide, real property rights filings show the smoothest growth pattern within the category of civil lawsuits.
- According to the National Center for State Courts, in 1991, tort cases made up only 10 percent of the state court civil case load, while domestic relations cases made up 33 percent of the total caseload, contract cases were 14 percent, small claims cases were 11 percent, and real property cases were 10 percent.

Myth: Jury awards are erratic and excessive, giving "windfalls" to undeserving plaintiffs

Studies show that injured people are not reaping any sort of "windfall," either from the legal system or from other compensation systems. In fact, under our current systems, injured people must absorb and pay for much, if not most, of their injuries themselves:

- Based on a survey of over 2500 injured individuals across the country, the Rand institute for Civil Justice estimates that the nationwide cost of nonfatal injuries (excluding those caused by drugs, toxic products or work-related stress) is about $176 billion, or almost 4 percent of the gross national product. Yet injured Americans recover only about 60 percent of these losses through public and private sources—they must shoulder the remaining 40 percent out of their own pockets. Those who suffer permanent disability fare even worse—they must pay a full 80 percent of their costs.

The Rand study concludes: "Most Americans who are injured in accidents do not turn to the liability system for compensation." Although 75 percent of injuries had the potential for a liability claim or lawsuit, only 10 percent of injured parties ever pursue a liability claim. In cases not related to the workplace or motor vehicles, only about 3 percent of those injured file liability claims.

- A 1989 GAO study of product liability cases in five states showed that total awards for compensatory damages bore a strong relationship to the severity of the injury and the underlying economic losses. That is, juries awarded the greatest damages to victims with the greatest losses, not the windfall awards that are frequently reported. Furthermore, the GAO found that plaintiffs won in fewer than 50 percent of the product liability cases studied.

• A study of product liability decisions in state and federal courts by Professors James Henderson and Ted Eisenberg of Cornell University Law School found a distinct and significant increase in product liability decisions favoring defendants during the 1980's. In other words, even under current laws, plaintiffs are finding it more and more difficult to win product liability lawsuits—in 1988, plaintiffs lost over 60 percent of the time.

Myth: Punitive damage awards are skyrocketing in size and frequency

Ever since punitive damages began to be awarded against grossly reckless or willful corporate wrongdoers, the cry has rung out from these same corporations and their allies that punitives are "out of control" and must be restricted. Once again, studies show otherwise:

Professor Michael Rustad of Suffolk University Law School and Professor Thomas Koenig of Northeastern University conducted an exhaustive two year study of punitive damage judgments awarded in product liability cases in the U.S. According to Profs. Rustad and Koenig, punitive damage verdicts were neither numerous nor exorbitantly high, nor are they increasing at an alarming rate.

• They could find only 355 punitive damages verdicts in state and federal product liability cases since 1965 (they found no such verdicts before then). Over one-quarter of these cases involved asbestos.

• With the exception of asbestos cases, the number of punitive verdicts in product liability cases has been falling in the last six years.

• Plaintiffs received the full amount of the punitive damages initially awarded in only 44 percent of the cases. More than one-third—38 percent—of all plaintiffs awarded punitives collected none of the award at all.

Stephen Daniels of the American Bar Foundation studied over 25,000 civil jury awards between 1981 and 1985 and reached similar conclusions:

• Punitives were awarded in less than 9 percent of successful product liability cases. (Plaintiffs were successful in only 40 percent of products cases.) The median punitive damage award was $30,000.

Myth: The product liability system has not made the marketplace safer

Supporters of efforts to limit corporate liability deny that the product liability system has enhanced the safety of the marketplace. But the long list of products that were made safer or driven from the market following the publicity and damage payments brought on by product liability lawsuits belies this claim. This list includes the Ford Pinto, the Dalkon Shield and Copper-7 IUDs, silicone breast implants, the Bjork-Shiley heart valve, GM pickup trucks with side-saddle fuel tanks, all-terrain vehicles, the Jeep CJ, super-absorbent tampons, flammable baby pajamas and unsafe product packaging.

Empirical studies of the product liability system provide further proof that our civil justice system leads to safer products. In 1987, the Conference Board, a business-funded research organization, surveyed the risk managers of 232 major U.S. corporations about the effects of product liability laws on their companies. They concluded:

"Where product liability has had a notable impact—where it has most significantly affected management decision making—has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit.

This is consistent with the findings from a 1987 Consumer Federation of America (CFA) report. According to CFA, relatively few companies had a product safety management position in the early 1970's. But by the end of that decade, virtually all companies had a strong product safety presence in their management structures. CFA found that this heightened attention to safety had produced dramatic change in the rate of accidental injuries and deaths in the U.S. CFA concluded that "approximately 6,000 deaths and millions of injuries have been prevented on an annual basis now because of product liability and other forces toward greater safety in our society."

In his study of punitive damage awards and their aftermath, Prof. Rustad found that 190 of the 252 non-asbestos defendants who were subject to punitive damage awards took steps that made the marketplace safer. In 80 percent of these cases, the steps taken were significant, such as fortified warnings, product withdrawals, and added safety features.

Myth: Our product liability system places the United States at a competitive disadvantage compared to the rest of the world

Not one objective study of U.S. manufacturing competitiveness cites the civil justice system as a significant problem for American businesses. For example, a recent, exhaustive report on competitiveness by the Office of Technology Assessment (OTA) did not mention the U.S. liability system as an impediment to U.S. manufacturers. The OTA found that the four major factors most inuencing U.S. manufacturing competitiveness were: capital costs, the quality of human resources, technology transfer, and technology diffusion. Other important influences on competitiveness, according to the OTA, included the difficulty of accessing Japanese technology, the merits of industry-university research consortia, intellectual property protection and antitrust law enforcement.

The business-backed Conference Board went even further, stating affirmatively in their 1987 report that product liability laws do not have significant adverse effects on competitiveness. They found that for more than two-thirds of the companies surveyed in their study, liability costs amounted to less than 1 percent of total costs. The Conference Board concluded:

> For the major corporations surveyed, the pressures of product liability have hardly affected larger economic issues, such as revenues, market share or employee retention.

The Rand Corporation's Institute for Civil Justice is perhaps the leading research organization focusing on our liability system. A 1988 Rand report stated that, "[t]he studies suggest that the direct costs of product liability still represent a very small share of value added for most manufacturing firms (less than one percent), even in reputed high exposure sectors." The study went on to report that "* * * apart from Bendectin, no one could offer an example of a major product withheld solely from the U.S. market as a result of liability concerns.

High-exposure sectors are successfully competing in world markets—If the product liability system were significantly harming U.S. competitiveness, the companies in sectors with high liability exposure would be having the most difficult time succeeding in worldwide competition. But a review of industries and companies in high-risk areas that should be most hard hit by the product liability system show that exactly the opposite is true. In many cases, the firms with highest liability exposure are having the greatest success in innovating and competing in world markets.

A Washington Post article from October, 1991, "U.S. Firms Stage Competitive Revival," stated,

> Statistics show that U.S.-based manufacturing companies remain highly competitive in a wide range of products, including diesel engines, heavy construction equipment, computer software, high-speed computers, medical instruments, aircraft, chemicals and pharmaceuticals.

All of the categories mentioned, except for the two computer-related industries, show up in most lists of business sectors requiring relief from burdensome lawsuits in order to compete successfully.

The Post went on to discuss some companies that are having particular success by technological innovations. For example, they cited General Electric's $1.1 billion increase in exports of products, including turbines, aircraft engines, refrigerators, light bulbs and X-ray equipment—again, many of these products are claimed to be holding the U.S. back in terms of innovation and competitiveness because of product liability concerns. Likewise, the article stated that Caterpillar, Inc., maker of heavy construction machinery, had a sales growth of 33 percent since 1980, and regained 8 percentage points of market share in North America in the past two years.

In October of 1991, U.S. News and World Report reported on five U.S. firms that they called "the toughest companies in America" because the companies have double digit sales growth and derive more than one-third of their revenues from abroad. Four out of the five companies selected were in high-risk, high-liability industries:

- Pall Corporation, maker of medical filters that drain blood of potentially harmful white cells;
- Pfizer, Inc., a leading pharmaceutical firm;
- U.S. Surgical, maker of medical instruments; and
- Thermo Electron, producer of paper machinery, portable bomb and drug detectors, natural gas automobile engines and artificial hearts.

According to U.S. News technological ingenuity and new product development were the characteristics that accounted for the success of these firms. In other words, these companies were beating out their foreign competition because of innovation. Clearly, the U.S. product liability system was not an insurmountable barrier for these high-exposure firms.

Two industries in particular are often singled out as areas in which product liability lawsuits have hindered the development of new products—pharmaceuticals and

chemical products. In fact, two provisions in S. 687 would greatly benefit these industries—the limitation on joint and several liability, which greatly benefits chemical manufacturers, and the elimination of punitive damages for drugs and medical devices with pre-market FDA approval. A look at these industries shows that, on the contrary, neither are in need of special bail-outs from U.S. product liability laws.

The chairman of Pfizer, Inc. stated as much when he responded to the question, "What are the prospects for your organization for the coming year?" in the Washington Post in 1991. He stated, "There are few exceptions, as in any time, and our industry [health care] happens to be one of those. Our [products] are doing well, across the industry, for several reasons * * * The health care industry is in a time of unprecedented development of new technology." This is consistent with a national advertising campaign being run by the U.S. Pharmaceutical Manufacturers' Association which boasts of their industry's competitive and innovative superiority. One ad states, "If every industry in the United States were this internationally competitive, there would be no trade deficit. There would be a major trade surplus."

Similarly, Professors Nicholas Ashford and Robert Stone of MIT studied the effects of the product liability system on innovation and safety in the chemical industry for the Brooking's Institution book The Liability Maze. They concluded:

- Tort liability promotes safety and health.
- Tort liability tends to encourage safer innovations and to discourage unsafe innovations.
- Chemical hazards are under-deterred by existing liability systems. By strengthening the ability of consumers, workers, and innocent bystanders to recover more fully, more deterrence, safer products and workplaces, and more socially-desirable innovation could be encouraged.

Our global competitors are seeking to adopt U.S. product liability laws—Promoters of the competitiveness excuse for product liability restrictions like to point to the less-protective laws in Europe and Japan as a rationale for cutting back on consumer protections in the U.S. There are many flaws in this argument.

First, the differences that exist between the U.S. legal system and the legal systems in other countries do not give a competitive advantage to foreign manufacturers because, in general, companies are subject to the liability laws of the country in which their product is sold or causes injury. For example, if a defect in a Japanese car that is sold in the U.S. causes an injury, the Japanese manufacturer will most likely be sued in an American court and be subject to our product liability laws. Likewise, if an American automobile injures someone in Japan, most often the rules of the Japanese legal system will apply.

Second, the countries of the world are gradually seeking to adopt many of the proconsumer features of our product liability system. In 1988, the European Economic Community (EEC) adopted a directive on product liability that will make their product liability systems more like the U.S. system and more favorable to consumers. The EEC found it necessary to take this step even though injured consumers in Europe can take advantage of government programs that mitigate the need for damage awards from manufacturers: national health care, greater and more available unemployment benefits, larger legal aid programs, and more intrusive government regulation. Ironically, among its provisions, the EEC directive adopts the doctrine of joint and several liability, while at the same time, in the name of worldwide competitiveness, S. 687 would severely limit joint and several liability in this country.

Japan may not be far behind in moving toward a more consumer-oriented legal system. In fact, in 1992 the Japanese government considered proposals that would have resulted in greater liability for firms selling products in Japan than is imposed under current laws in the U.S.

The most direct statement of the growing liability exposure in other countries came from an in-house attorney for the pharmaceutical firm of G.D. Searle. He cited the lack of contingency fees in other countries, government assistance for private plaintiffs in suing pharmaceutical companies, and the unavailability of key defenses, coupled with the availability of pro-plaintiff liability doctrines, as reasons that the international legal environment may be less hospitable to industry than the U.S. system. The Searle attorney stated that consumers around the world are just as likely to sue as American consumers, and that litigation is as expensive outside the U.S. as it is inside.

Finally, it must be pointed out that, if our liability system was such a burden to businesses, so many foreign companies would not be seeking to locate in the U.S., nor would they be so eager to sell their products here where they are subject to our legal system.

Myth: Product liability insurance is too expensive

In 1991, state insurance departments asked insurance companies for separate product liability data for the first time. The data included all judgments, settlements and denials of claims made over the decade ending December 31, 1991. In September, 1992, the National Insurance Consumer Organization (MCO) issued a report entitled, "Product Liability: 1991 Calendar Year Experience," which analyzed this first-time ever product liability insurance data. I would like to submit this report for the record of today's hearing.

The NICO report concluded that manufacturers have been greatly exaggerating the impact of lawsuits on product costs. The report showed that:

- As a percent of product retail sales, product liability insurance premiums paid to insurance companies in the United States in 1991 cost only .14 percent.
- Even including firms that self-insure, the total cost of product liability lawsuits in 1991 was between .2 and .4 percent, using conservative assumptions about the degree of self-insurance.
- Over the past decade, under 56,000 persons a year received payment for product injuries from product manufacturers' insurance companies.
- Manufacturers' insurance companies paid nothing in over half—56 percent—of all claims closed in the decade.
- The average payment to victims of all claims closed (including verdicts, settlements and those closed with no payment) during the decade was $3,767; for those closed with payments, the average was $8,577.
- Victims' attorneys received an estimated $1,256 on average for each product liability claim closed during the last decade. Insurance company defense attorneys received $2,028 per claim, or more than one and one-half times as much as victims' attorneys.

Myth: S. 687 will reduce insurance rates

Immediately following the insurance crisis of the mid-1980's, the National Association of Insurance Commissioners testified that, "the NMC has not concluded that excesses in the tort system were the primary cause of the liability crisis." In fact, in the states that have enacted restrictive tort rules, insurance rates have not dropped more than in states without such limitations.

In addition, a spokesperson for the American Insurance Association, a leading property and casualty insurance trade association, testified before the Senate Commerce Committee about legislation very similar to S. 687: "The liability legislation would lead to no real change in the insurance costs for businesses."

Myth: The legal system costs between $80 billion and $300 billion per year

For years now, opponents of victims' rights have claimed that the legal system imposes tens of billions of dollars in costs on society, without ever mentioning the benefits that flow from the compensation and product safety effects of the system. What is worse, no one has yet provided adequate documentation to support any of the figures that have been put forward. The most valid documentation for costs of the product liability system come from the insurance industry's own data, compiled by the National Insurance Consumer Organization, and discussed above.

Peter Huber of the conservative think tank the Manhattan Institute has said that the indirect costs of the liability system are about $300 billion per year. To calculate these indirect costs, Huber used a figure of $80 billion as the direct costs of the tort system. The genesis of this number appears to come from an offhand comment made by Robert Malott, CEO of FMC Corporation, with no accompanying documentation. Then Huber multiplied $80 billion by 3.5, and rounded the $280 total up to $300. The 3.5 multiplier came from a survey of doctors by the American Medical Association, which reported that doctors spend $3.50 extra for every $1.00 of medical care because of the fear of being sued. This number has never been verified, and in any case, there is no basis for generalizing it to other sectors of the economy like product liability. Even Huber admits this. He has stated, "Nobody knows what the indirect cost is. What I said was that if the same multipliers operate in other areas, it's $300 billion. If they don't, it's not."

Another popular source is a $117 billion figure cited by the Brookings Institution's The Liability Maze: The Impact of Liability Law on Safety and Innovation. This figure comes from a 1989 study by Tillinghast, a leading insurance consulting firm. Upon analysis, it becomes clear that this number covers all insurance and liability costs, including executives' salaries and other immense costs of operating the highly inefficient insurance industry, and has very little to do with the costs of the civil justice system.

S.687 IS UNFAIR TO CONSUMERS

In virtually every instance, the claims of proponents of legislation to limit the rights of victims of defective products have been refuted. Supporters of S. 687 have simply failed to make a compelling case that our 200 year-old system of product liability laws should be altered to favor manufacturers and harm injured victims. In the absence of convincing arguments for the need for legislation, S. 687's supporters often promote the bill by claiming that the legislation is more "moderate" than previous proposals. I have already described vivid examples of how the legislation would hurt innocent, injured individuals. The following, more general, analysis of the provisions of S. 687 shows that the bill remains unfair to consumers, taking away important rights that they currently enjoy. At the same time, the bill contains no provisions that would alter current law to the benefit of consumers or injured victims.

S. 687 would eliminate the doctrine of Joint and several liability for pain and suffering damages—Eliminating joint and several liability for pain and suffering damages would be unfair to consumers, increase the workload of courts, and increase the cost and complexity of litigation.

The joint and several liability doctrine applies to situations where multiple wrongdoers act in concert to cause an injury to a victim or where they cause an injury which cannot be divided among them in a logical fashion. If multiple parties are jointly and severally liable, the victim may recover in full from any of the wrongdoers.

Joint and several liability helps to ensure that victims injured by more than one wrongdoer receive full and fair compensation. The doctrine also encourages manufacturers to market safe products by increasing the likelihood that they will have to pay the full costs of injuries caused by their defective products. S. 687 would undercut these important functions by eliminating joint and several liability for pain and suffering damages.

Proponents of product liability legislation claim that joint and several liability is frequently used against deep-pocket corporate defendants who may bear little responsibility for a victim's injury. They are wrong on both the law and the facts:

- Joint and several liability does not apply to situations where a wrongdoer's acts have merely played a slight or insignificant role in causing the victim's injury. A defendant may only be held jointly and severally liable if their actions alone could have caused the entire injury or were an essential factor in causing an indivisible injury.
- Joint and several liability is rarely an issue in product liability cases. A study by the State Bar of Wisconsin which examined 834 personal injury trials in that state between 1985 and 1986 found that the joint and several liability rule affected only 13 verdicts. Stated another way, the joint and several liability rule was not an issue in 98.4 percent of the cases examined.
- The joint and several liability doctrine contains a mechanism to help ensure that defendants do not pay more than their fair share of damages awarded. A defendant found jointly liable is entitled to receive contribution from other wrongdoers for their portion of the damages awarded.

In an effort to strike a compromise between preserving the current rule of joint and several liability, and its complete elimination, S. 687 would eliminate the doctrine solely for "non-economic" damages. But non-economic losses are as real, and can be even more important, than financial losses. The elimination of joint and several liability for non-economic damages is unfair, hurts the most seriously injured victims, and discriminates against injured women, children and senior citizens:

- Under joint and several liability, a victim must only prove that a defendant was significantly responsible for an indivisible injury. With the elimination of joint and several liability, a victim must prove each wrongdoer's degree of fault. This places an unfair burden on victims who have less information and expertise than defendants about product manufacture, design, and marketing.
- The elimination of joint and several liability for pain and suffering damages would adversely affect those victims who need protection the most Generally, pain and suffering damages are awarded to the most seriously injured victims, such as quadriplegics, persons suffering brain damage, and burn victims. Studies indicate that seriously injured victims often recover less than their out-of-pocket expenses in product liability cases. Eliminating joint and several liability for these victims would further reduce their recovery.
- It is misguided to separate pain and suffering and other "intangible" damages from other types of damages. Compensation for non-economic loss is compensation for real loss, and should be treated in the same manner as damages for out-of-pocket expenses. For example, a woman who loses her ability to ever bear children, a

youngster whose childhood is stolen away because of prolonged illness or injury, or parents who lose their children, all suffer losses that deserve compensation, even if the loss does not result in direct financial expense.

• The elimination of joint and several liability for non-economic damages has discriminatory results because it targets a very specific population—low or non-wage earners. In other words, those most adversely affected would be women, children and the elderly—people who generally will not have high wage loss in the event of death or serious injury.

The abolition of joint and several liability would also increase courts' caseloads, discourage settlements, and add litigation costs:

• The joint and several liability doctrine provides a defendant with strong incentives to settle claims, rather than risk being held responsible for all damages at trial. Defendants would be more likely to offer a smaller settlement or go to trial if they know their liability will be arbitrarily limited. Given that defendants would offer smaller settlements, and given the need to recover from all wrongdoers to be fully compensated, victims would be more likely to go to trial in hopes of obtaining more than partial recovery.

• Even a small decrease in the number of product liability suits which settle would have a dramatic effect on court dockets. One study found that a mere I percent decrease in the number of cases which settle would cause a corresponding 20 percent increase in the number of cases which go to trial.

• Under S. 687, a plaintiff would have to prove the precise responsibility of each defendant, thereby complicating trials and adding costs. Under the joint and several liability doctrine, this issue does not generally take up the time of litigants and courts. Multiple wrongdoers usually settle their contribution claims against each other privately after the trial.

S. 687 would undermine the important role of punitive damages [1]—Punitive damages protect consumers by deterring manufacturers from consciously or recklessly marketing a dangerous product 5.687 would undercut this important function by making it more difficult, and in some cases impossible, to recover punitive damages from manufacturers who market unsafe products.

Punitive damages are necessary to punish and deter manufacturers who consciously or recklessly market a dangerous product. Without this threat, and the uncertainty of its financial costs, manufacturers could treat compensation for death and injury caused by their products as just another cost of doing business. Furthermore, punitive damage awards are rare in product liability lawsuits, and are only awarded where consumers can prove manufacturers engaged in outrageous misconduct:

• A recent exhaustive study by Professor Michael Rustad found only 355 punitive damage awards in product liability lawsuits in a 25-year period. Rustad's study found that in 190 of 252 non-asbestos cases, defendants took some steps to improve safety subsequent to punitive damage awards. In 80 percent of these cases. the steps taken were significant-improved warnings, product withdrawals, and the introduction of new safety features.

• A General Accounting Office ("GAO") study which surveyed all product liability lawsuits in five states between 1983 and 1985 found that punitive damages were awarded in only 9 percent of the cases examined.

• A study conducted by Stephen Daniels and Joanne Martin of over 25,000 punitive damage awards found that punitive damages were awarded in only 4.9 percent of cases examined and in only 8.9 percent of product liability cases won by plaintiffs.

• A study for the American Bar Foundation by Stephen Daniels reviewed 402 product liability cases and found that punitive damages were awarded in only 11 of the cases examined.

• Studies conducted by the GAO and by Professor Michael Rustad demonstrate that punitive damage awards are directly correlated to the size of compensatory damage awards. Rustad's study further demonstrates that punitive damages are generally awarded in cases involving death or serious injury.

S. 687 would provide an absolute shield from punitive damages for manufacturers of government-approved drugs, medical devices, and aircraft. Government approval

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[1] We are troubled that S. 687 limits punitive damages even more stringently than its predecessor—S. 640 in the last Congress. Both bills prohibit the awarding of punitive damages in the absence of an award of compensatory damages, but S. 640 had an exception that S. 687 does not. S. 640 allowed punitive damages in actions "in which the alleged harm to the claimant is death and the applicable State law provides, or has been construed to provide, for damages only punitive in nature, a defendant may be liable for any such damages regardless of whether a claim is asserted under this section." There is no reason to prohibit punitive damages in these very limited circumstances.

of drugs, medical devices or aircraft should not give a manufacturer the license to market a product which it knows is unsafe or defective. When government requirements are outdated, under-protective or do not reflect the state of knowledge of experts, manufacturers must be responsible for ensuring that the products they sell are safe. Moreover, manufacturers should be punished when they take advantage of government agencies that lack the resources to respond swiftly to reports of safety defects.

The Food and Drug Administration ("FDA") has failed to protect consumers from dangerous drugs and medical devices because its safety standards are frequently outdated, it has limited remedial powers, it is underfunded, and it frequently ignores evidence which suggests that products are dangerous.

For example, the FDA unit in charge of approving new medical devices—the Center for Devices and Radiological Health (CDRH) --has approved several products that had serious safety problems, according to a May 1993 report by the House Subcommittee on Oversight and Investigations of the Energy and Commerce Committee. The report found that CDRH has been unable to assess clinical data, establish effective approval procedures, and assure that foreign manufacturers provide enough data for approval. Devices that should not have been approved by CDRH include:

- The Bjork-Shiley heart valve was approved in April 1979. CDRH received numerous complaints about defects in the valve, but failed to take any action. Shiley finally stopped marketing the valve in 1986. As of January 1993, there have been 367 reported fractures of the 60-degree valve, and 134 reported fractures of the 70-degree valve; and
- Silicone breast implants were first approved in 1964. In 1976, federal legislation required further testing be done and supplied to the FDA, but no further information was given to the agency and the FDA waited until 1988 to take formal action to require manufacturers to supply further information. The FDA took this action only after numerous complaints of complications. In 1992, the FDA imposed a moratorium on implants except for those in "urgent need."

The public's health continues to be unreasonably and inexplicably jeopardized by unsafe and ineffective medical devices, despite the passage of the Safe Medical Devices Act (SMDA) of 1990. Congress passed the SMDA because 98 percent of the 5,000 medical devices that enter the market each year do so without rigorous premarket testing, but on the basis of a claim by their manufacturer that they are substantially equivalent to an earlier device. More troubling, over 80 percent of the devices that are potentially the most dangerous (Class III), enter the market simply on the basis of a claim by the manufacturer that they are "substantially equivalent" to a device already on the market. Thus, manufacturers of these devices enjoy a loophole by which they may avoid rigorous testing of their devices for safety and effectiveness. The SMDA specifically addressed this loophole in legislation, but 34 months after enactment of the SMDA, final rules have not been promulgated to implement the statute.

A review by Public Citizen's Health Research Group found that the majority of manufacturers are not taking their obligations under the SMDA seriously, most likely because of their perception that FDA's slow pace of rulemaking is an indication that the agency is not taking the matter seriously.

Congress should be increasing the incentives for manufacturers to improve the effectiveness and safety of medical devices. Unfortunately, S. 687 does just the opposite. By allowing manufacturers to escape punitive damage liability if the "device is generally recognized as safe and effective pursuant to conditions established by the Food and Drug Administration," S. 687 takes away a powerful incentive for manufacturers of medical devices to conduct rigorous safety testing before introducing a device.

The FDA's lax regulation is not limited to its regulation of medical devices; the following examples graphically illustrate the FDA's failure to protect the public safety from dangerous drugs as well:

- After granting approval to market Zomax, the FDA ignored reports that the drug caused some users to experience allergic reactions resulting in death or serious injury. Fourteen people died and more that 400 suffered life-threatening allergic reactions before negative publicity forced the manufacturer to pull Zomax from the market.
- The FDA approved marketing of the drug Oraflex without reviewing all significant safety information in its possession. Three months after FDA approval, the manufacturer removed Oraflex from the market after it was implicated in numerous reports of serious and sometimes fatal liver and kidney disease.
- The FDA approved marketing of the sedative Versed at dosages which were substantially higher than those shown to be effective in published studies and those

approved in Britain. Before the FDA acted to lower Versed's permissible dosages, 40 people died from cardiac or respiratory depression resulting from use of the drug.

Simliarly, the Federal Aviation Administration ("FAA") has failed to protect consumers against dangerous products. FAA regulations only prescribe minimum safety standards, and employees of aircraft manufacturers perform certain safety inspection and certification functions for the FAA. Examples of safety problems with FAA-certified aircraft abound:

- Aviation Consumer magazine found the Cessna 411's safety record to be so deplorable, it recommended that the aircraft be grounded.
- The British Civil Aviation Authority refused to certify the Piper Cheyenne because it found the aircraft's pitch to be "so extreme that we just did not believe it could possibly be true."
- At least seven Piper Malibus have crashed in the past 5 years due to airframe failure, killing 19 persons.
- Design defects have caused 250 Beech Aircraft's V-Trail Bonanzas to break apart while airborne, killing 500 people.

S. 687 would bar injury claims for products over 25 years old used at the workplace—even If the dangerous defect existed at the time of manufacture—Section 204(b)(1) would automatically cut off remedies even before the injury or death occurred or before these claims reasonably could be asserted. This automatic cut-off would operate to prevent recoveries, irrespective of the useful life of the product, which varies from one product to the next.

It is illogical to bar just, provable claims, without any regard to the underlying cause of the injury solely because of the age of the product. It is extremely difficult to prove the existence of a defect in an old product and few lawsuits involve such products. However, under certain fact patterns, a verdict for the plaintiff where the product is older than 25 years is the only just result.

For example, Tom Lohmann and Mel Essenmacher of Toledo, Ohio were both severely injured in an explosion of a defective air compressor. The accident occurred during their work for an auto transmission company. The explosion, resulting from a failed safety valve, ripped off Lohmann's foot and inflicted multiple fractures on Essenmacher. Mr. Lohmann was able to wear a prosthesis and return to work, but Mr. Essenmacher, after enduring six surgeries, was not able to work again. The two men brought suit against the compressor manufacturer in 1984, and the cases were settled for a total of $1.65 million.

The air compressor was installed in 1953, by employees of the original manufacturer, who provided the wrong kind of safety valve, installed it in the wrong location, and positioned it in such a way that its moving parts would become clogged with dirt. Proper installation methods were known in 1953, and have never changed.

Because S. 687 would establish a 25-year statute of repose for capital goods, it would deny these workers any recourse against the manufacturer, who designed, manufactured and installed a product that was a time bomb waiting to explode, even years later.

The automatic cut-off in the bill would operate to prevent Mr. Lohmann and Mr. Essenmacher from receiving any compensation from the manufacturer of a defective product, known to be defective at installation. Given that it is extremely difficult to prove the existence of a defect in an old product, it makes no sense for Congress to take away that slim possibility through legislation like S. 687, where such a finding is justified on the facts of the case.

S. 687 would add to litigation in the workers' compensation system—In theory, the workers' compensation system exists to provide fair and adequate recompense to injured workers (and the survivors of deceased workers). Unfortunately, in practice, state workers' compensation laws provide inadequate relief to those suffering traumatic injuries and little or no relief to those suffering illnesses associated with exposures to toxic substances. In particular, serious problems continue in the areas of unduly restrictive coverage, woefully inadequate benefit levels, an incapacity to cope with the losses occasioned by occupational disease, and an increasingly unresponsive administrative process. Yet, the only problem of the workers' compensation system that S. 687 attempts to address is the manner in which the system allocates liability between employers and manufacturers through subrogation liens and contribution suits.

Although its aim may be to reduce transaction costs, Sec. 205 actually invites litigation between workers and manufacturers and between employers and manufacturers. To the extent Sec. 205 succeeds in reducing transaction costs, those savings should be put back into the workers' compensation system to improve the benefit levels. Instead, under S. 687, the sole beneficiaries of any savings will be manufacturers and employers.

S. 640 would limit the liability of product sellers other than manufacturers—Product sellers should be responsible for injuries caused by unsafe products because sellers can, and often do, inspect and test their products for quality and safety. Moreover, by holding product sellers to a high standard of care, the law encourages quality control practices that will lead to safer products.

Product sellers can exert substantial pressure on manufacturers to produce safe products by refusing to carry unsafe and untested goods. Sellers will be most inclined to apply this pressure if they are held responsible for dangerously defective products. S. 687 would remove an important incentive for sellers to ensure that the products they sell are safe.

S. 687's settlement and alternative dispute resolution procedures are inadequate—While the settlement and alternative dispute resolution procedures in S. 687 are less draconian than the provisions in previous proposals, the procedures do not adequately address the tremendous hurdles faced by consumers who are injured by defective products and seek compensation through the civil justice system.

Section 101 creates "incentives" for parties to settle cases before trial by penalizing the party that misjudges a jury award. If a plaintiff chooses to go to trial rather than accept a defendant's settlement offer, and an amount less than the settlement offer is awarded by the jury, the winnin2 plaintiff would be forced to pay the defendant's attorney's fees and costs out of any collateral benefits received.

Section 101 misunderstands consumer behavior in liability actions. Consumers with outstanding medical bills and other expenses will settle when reasonable and adequate amounts are offered. No penalty (even one that is less onerous than previous proposals) is necessary to induce a consumer to settle. As Professor Janice Toran notes:

> In personal injury suits * * * the plaintiff is usually a citizen of modest means and the defendant is an insurance company. This situation often creates an asymmetry of risks where the individual plaintiff perceives the lawsuit as a unique event, while the company defendant perceives it as a regular and calculable part of business. As a result, the plaintiff is likely to be more risk averse than the defendant, and will accept a smaller sum than the plaintiff is due to avoid the risk of losing. Risk aversion increases as the amount at issue increases, ironically resulting in higher discounting by plaintiffs with serious cases.

Section 101 is unfair because it penalizes consumers who successfully prove liability in court, but who guessed incorrectly and end up receiving less from the jury than they believe they are entitled to.

While Section 102 recognizes that consumers do not need incentives to pursue alternative dispute mechanisms, the provision does not significantly improve access for plaintiffs with small product-related losses. These consumers are not able to secure a lawyer and file an action at all. A better proposal would provide alternative systems for victims with small claims. In order to benefit consumers, the alternatives must be streamlined to ensure their affordability. Otherwise, the victims will be effectively barred from the system, just as they are shut out of the existing litigation system. Ideas for streamlining the system include: relaxing proof requirements, limiting or eliminating expert witness testimony, limiting discovery periods and methods, and limiting trial time. The system must be binding on the parties, or else defendants will appeal every decision, knowing that the plaintiffs damages cannot sustain a full-blown lawsuit. Finally, the small claims process should be voluntary on the part of the injured party—if that party can afford to bring a lawsuit, he or she should be entitled to do so.

CONCLUSION

Under current laws, it is already very difficult for victims of dangerous products to receive compensation through the legal system. Nevertheless, proponents of limiting corporate responsibility claim that we must further restrict access to the courts by enacting unfair, anti-consumer legislation like S. 687. They fail to make their case.

Until we see an end to unnecessary and tragic stories of product victims, like Mr. and Mrs. Fair and Mr. and Mrs. Barbee, we will continue to oppose efforts to limit manufacturer responsibility. And until we have universal, affordable national health care, more adequate compensation for lost wages, and more active health and safety regulation, we will fight against any attempts to deny compensation to wrongfully injured individuals. We urge you to reject S. 687.

Thank you.

Senator BRYAN. Thank you, Ms. Gilbert, for your testimony. Ms. Smith, we will hear from you next.

STATEMENT OF SUZELLE M. SMITH, ESQ., HOWARTH & SMITH

Ms. SMITH. Mr. Chairman and members of the committee, I am Suzelle Smith, and I am a trial lawyer from Los Angeles, CA.

When the committee asked me to come testify it was virtually irresistible to me to accept the invitation. I started my professional career some 13 years ago, sitting in those folding chairs back behind the Senators where the staff members are sitting, as a legislative assistant to Senator Howell Heflin. The only committee member here today that was on the committee at that time is Senator Hollings, and it is good to see you again, Senator Hollings.

A little bit about my background so that you know where I am coming from. I cross-examine a lot of witnesses, and I think it is only fair that you know what I do, and I have no constituency that I represent here today, but I am a corporate defense lawyer from Los Angeles, not insurance defense, but I represent corporations directly.

I represent plaintiffs and defendants in business litigation, both sides, and I represented plaintiffs in catastrophic injury cases, including products liability litigation, so I truly come to you with experience from both sides of the courtroom.

I also come today—I am a believer in the jury system. I am a trial lawyer. I love trying cases. What I do most of the time is stand up in front of 12 jurors in a State courtroom or a Federal 6-person jury. I respect juries, and I am here to protect, I hope, or assist in protecting the products liability system, not to destroy it.

There are perceptions of unfairness about the present products liability system, and it is not just perceptions of unfairness by product manufacturers or defense lawyers. There are perceptions of unfairness by members of juries, the people that I deal with in and out, day in, day out, when I go down to court, and it is interesting, the two things that I am going to talk to you about, the areas of the bill that I have been asked to discuss or principally focus on, have to do with the joint and several liability portion of the bill and the punitive damages portion of the bill.

California—the present California law tracks pretty closely the provisions in the Senate bill for joint and several liability and also the punitive damages provisions. We have had those provisions in California for some time and I have some track record to talk to you about.

Joint and several liability I want to talk to you about first. The issue in California came up—the legislature talked about it, but the way joint and several liability was reformed in California, to a several system for noneconomic damages with a full joint and several system for the economic damages, was by a voter initiative.

Not the legislators, not the lawmakers, the voters perceived that it was unfair for a defendant who was peripherally liable to be in for a penny, in for a pound—in for 1 percent and having to pay the whole tab for the entire amount of the damages that might be awarded for a catastrophic or medium sized or any other injury. The voters, the jurors, have the perception that it is unfair that

someone who peripherally caused, or minimally caused, or was a de minimis cause, would have to pay the whole tab.

I listened to the panel that went on before we did, and Professor Finley suggested that, and I appreciated a lot of her testimony, but she suggested that juries would find that each defendant was 100 percent responsible for each injury, and I submit to you that that is not the way it works in California. If you are a substantial factor, one of the substantial factors, a contributing cause, then you are in, and you are a legal cause.

So, it is not that each one is 100 percent, but it is adding up to 100 percent. Juries in California decide how much allocation of fault is appropriate for each defendant and they make that allocation, and they can make that allocation. It is possible to do it, they have been doing it for the last 6 years since proposition 51 passed, and it has worked fairly well. It has worked fairly equitably, I think, for both sides.

Now, what happens, in a practical sense, if you have the scenario where you have defendants on the jury ballot, on the verdict form, and some of those are bankrupt or insolvent, and so the plaintiff cannot collect a judgment against those insolvent defendants?

Well, in California, interestingly enough—let us take the time before the rule was changed. Under the old joint and several liability system, when I started my career as a lawyer, that was the system—in for a penny, in for a pound—and juries had a strange way of figuring out that it was unfair for a defendant whose liability was only de minimis, or minimally liable, to be in for the whole amount of the verdict or the judgment.

What happened to me in those days, when I had a minimally liable defendant, it was much easier for me to get a full out defense verdict. If I had the deep-pocket client, that meant the plaintiff could not recover any of the damages, not the economic, and not the noneconomic, if my client, the deep pocket but the minimally liable defendant, got a defense verdict and was out of the case.

After proposition 51 passed, it was a compromise. It does not give across-the-board allocation. It makes any defendant who is found to be a substantial factor liable jointly and severally for all the economic, all the medical expenses, all the lost earnings, the economic damages, and as a compromise only pro rata for the pain and suffering damages.

I do not think pain and suffering damages are unreal. I do not think they are incalculable. A jury is not incapable of coming up with numbers for those, but it was a compromise position, so that the plaintiff would be made whole on the economic and the noneconomic, the pain and suffering, would be shared proportionate to the defendant's degree of fault.

What happens now is if I have the deep pocket defendant and I am in for 1 percent, my client will have to pay the entire amount of the economic damages, only the 1 percent of the noneconomic, but the scenario I am spelling out for you from personal experience is that in fact plaintiffs in some cases are benefiting more from the California rule, because before, if I had gotten out with a defense verdict, my clients would be out, they would be gone. There would be no deep pocket defendant if I argued that my client was not a substantial factor successfully.

Juries have a sense of that, gentlemen. They have a sense of what is fair, they have a sense of what is right for both sides, and they do not like the idea that someone who is minimally liable would have to pick up the whole tab.

Like most lawyers, I like to talk, but I can see I have got a red light on and I have almost used up my time. I do want to speak just for a moment about punitive damages and the problem I see there.

The problem with punitive damages from my perspective is the idea that punitive and compensatory standards can be merged, so that really you are getting juries who are awarding punitive damages under a standard that is very close to a negligence standard. As long as they are kept separate, I believe in punitive damages, I believe in certain circumstances that they are appropriate, but where you have a merger, you have business people saying, I produce a product, I made some decisions that were reasonable, maybe they were wrong, but I am getting punished for punitive damages.

The thing I like about this bill is, it makes clear that a reasonable design, or manufacturing decision, reasonable, even if wrong, cannot form the basis for punitive damages, and I think that will give a lot of comfort to citizens, to Americans, to juries, and to business people, that there is a distinction.

There is a difference between the punitive, punishing standard and just making—sure, a conscious decision to design a product. Business people make decisions consciously to sell products. They make a decision and they may choose this design versus that design.

All products, gentlemen, have risks. There is no such thing as a risk-free product. It is impossible. It is a weighing and balancing of which risk you want to take. Some people get it wrong. When they get it wrong, they may have to pay compensatory damages, but they should not be punished for that kind of activity.

So, forgive me for going over my few minutes, Senator, but I appreciate very much being here.

[The prepared statement of Ms. Smith follows:]

PREPARED STATEMENT OF SUZELLE M. SMITH

Mr. Chairman and Members of the Committee, my name is Suzelle M. Smith. I am here today to discuss certain provisions of S. 687, specifically those dealing with punitive damages and joint and several liability.

By way of background, my academic credentials include honors degrees from Boston University, Oxford University, and the University of Virginia Law School. In addition to practicing law full time as a civil trial lawyer in Los Angeles, I also serve as an adjunct professor of law at Pepperdine University School of Law in Malibu, California, and next year will teach a full-term course in American Products Liability Law at Oxford University in England. I am an officer and founding member of the Los Angeles-West Inns of Court. I co-authored with my partner, Don Howarth, a book on trial practice published by Callaghan, Case Assessment and Evaluation, which addresses issues involving substantive and procedural tort law. I am admitted to practice law before all of the state and federal courts of California, Washington D.C., and Washington State, as well as the United States Supreme Court.

I am a trial lawyer and a managing partner of Howarth & Smith, a California-based law firm representing, among others, major U.S. companies nationwide in the defense of complex product liability litigation. For example, I briefed and argued *Anderson* v. *Owens-Corning Fiberglas*, on behalf of the defense. In Anderson, the California Supreme Court held that state of the art evidence is admissible on the issue of product defect in a strict liability action. My firm also on occasion represents indi-

vidual plaintiffs in significant personal injury and business litigation cases. The perspective that I bring to you is that of someone who has litigated a number of major cases, from both sides of the courtroom, that have turned upon some of the very issues which you are considering here today.

On a personal note, this is a bit of a home-coming. In the late seventies and early eighties my first job after graduate school was Legislative Assistant to Senator Howell Heflin. My assignment was the Commerce Committee, and he was at that time a member. During my time with Senator Heflin, I came to know most of the members of the Committee and their staffs, and developed an insider's appreciation of the Committee's responsibilities and its work.

PUNITIVE DAMAGES

Magnitude

For many years, awards of punitive damages and the structure of law under which they were made neither received nor merited special attention; punitive damages were infrequently assessed and were typically small in amount. However, during the last few decades there has been an explosion in the frequency, size, and availability of punitive damages awards. For example, through 1959, the largest punitive damages award reported in California was $10,000. During the 1970's the highest award reported and affirmed on appeal was $740,000. Since 1980, punitive damages awards of over $10,000,000 have been upheld on appeal in California, and at least one jury award of almost $100,000,000 is presently under review.

Frequency

Also, there has been an increasing frequency of such awards, and a dramatic expansion in the range of underlying circumstances and conduct found sufficient to support them. For example, a recent study[1] found that punitive damages were awarded in more than one out of every eight jury trials in San Francisco in which a defendant was found liable for compensatory damages.

Failure to Distinguish Compensatory and Punitive Damages

The modern view of punitive damages in the United States is that they serve the "purely public" purposes of punishing and deterring socially undesirable conduct. Indeed, it is arguable that under the U.S. Supreme Court's recent Haslip decision, that is the only constitutionally permissible purpose. Further, the offensive conduct should be of a qualitatively different character than negligence; it must be conscious and "aggravated" conduct. Punitive damages, of course, are not intended to discourage socially useful product development and innovation. Nevertheless, in many jurisdictions,[2] state laws do not sufficiently distinguish procedurally and substantively between punitive and compensatory damages, resulting in overkill. Unless it is believed that most corporations are controlled by monsters, punitive awards should be rare, appropriate only where egregious intent to harm the public welfare can be shown. If such flagrant, malicious conduct occurs, it should be punished and stopped. In contrast, making reasonable decisions regarding design and manufacture that turn out to be erroneous or even reflect poor judgment should not be a basis for punitive awards.

Conflicting Results

Further, the present system of punitive damages permits virtually unlimited exposure to a product seller distributing products nationally. As the Peterson study suggests, the increasing frequency of punitive damages awards and the ever-widening scope of application of the legal theories supporting such awards have made a particular defendant's likelihood of someday having to pay punitive damages much more real. However, the deterrent usefulness of punitive damages has also been undermined by the sometimes random character of such awards. Companies that manufacture, distribute and sell mass-produced products may be subject to hundreds or even thousands of individual lawsuits in different jurisdictions. For example, in a number of mass produced consumer product cases which have proceeded to trial, different juries have been asked to decide whether punitive damages should be assessed in addition to compensatory damages based on corporate decisions regarding design and manufacture. Although in each case essentially the same evidence and conduct may be reevaluated, various juries may and have reached wildly different

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[1] M. Peterson, S. Sarma & M. Shanley, Punitive Damages 9 (Rand Institute for Civil Justice, 1987).

[2] Some states, such as Washington, have eliminated punitive damages altogether in products cases by statute.

conclusions. Thus, a corporate defendant may be punished in one jurisdiction and exonerated in another for the same conduct involving the same product.

Multiple Punitive Awards

Another problem with the present system is isolation of the decisions of one jury from that of another regarding punitive damages. If a jury is told to calculate the amount necessary to punish or deter egregious conduct, it presently does so on the basis of the information before it and without knowledge of a defendant's other exposure to additional awards. Thus, multiple punitive awards far in excess of what the trier of fact intended are not only theoretically possible but a reality in certain circumstances.

Procedural Safeguards for Punishments

Given the modern view that, in the words of the California Supreme Court, "the purpose and function of punitive damages * * * is a purely public one," namely that [t]he public's goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or by other potential wrongdoers," it is simply not possible to derive a reasoned justification for the continued exclusion of civil defendants exposed to the devastating effects of essentially unlimited punitive damages awards from the wide range of procedural and substantive due process safeguards otherwise invariably afforded those whom the state seeks to punish by way of fine or penalty.

It is of no consequence or comfort to a defendant threatened with a financial death penalty that the punitive sanction visited upon it financially benefits another citizen rather than the state, or that the size of the sanction is determined by a jury's wide discretion rather than by statute, or that the sanction is characterized as "punitive damages" rather than as a "fine." In sanctioning and enforcing punitive damages awards for "purely public" purposes, the sovereign is imposing criminal sanctions by otherwise constitutionally impermissible means.

Burden of Proof

Adoption of subpart (a) of section 203, requiring use of the "clear and convincing" burden of proof in punitive damages awards, will be a significant step towards rebalancing the inequities just described. Use of the higher burden of proof in California has by no means crippled the ability of plaintiffs to secure punitive damages awards where they are appropriate, but has helped to impress upon juries that the imposition of punitive damages should not be undertaken lightly. It further underscores the philosophical distinction between compensatory and punitive damages.

Evidence of Other Awards

Adoption of subpart (e) of section 203 will also lay to rest the present widespread uncertainty as to the admissibility and relevance of evidence of other punitive damages awards, and the existence of past and potential compensatory damages claims, in the jury's determination of the amount of punitive damages it needs to assess in order to properly deter and punish conduct found meriting such damages. Federal and state appellate decisions across America dealing with the tens of thousands of mass tort cases that have been litigated contemporaneously reflect both widespread recognition of the need to give consideration to such factors, and judicial bewilderment as to how to do so within the constraints of existing legislation and precedent.

Bifurcated Trial

Additionally, S. 687's provision for a bifurcation of punitive damages from the compensatory phase of the trial will help segregate evidence that is relevant only if a defendant has been found liable under strict liability or negligence principles and also found to be the legal cause of plaintiff's injuries. Evidence relevant only to punitive issues can taint a jury's decision on liability for compensatory purposes, judicial instructions to the contrary notwithstanding. The California bifurcation process similar to that of S. 687 has worked well, avoiding mistrials and reducing appeals. Every trial lawyer knows the impossibility of "unringing the bell" or directing a jury to consider evidence "only for one limited purpose and not another.

ALLOCATION OF FAULT

The provisions of S. 687 mandating the apportionment of liability for non-economic damages in products liability cases among all of those contributing to the plaintiff's injury according to each defendant's degree of fault, while retaining joint and several liability for economic damages, closely parallel present California law. Not the legislature, but the voters of California passed an initiative establishing several-only liability for non-economic damages, based on an awareness of the fun-

damental inequity of requiring defendants only peripherally involved with a plaintiff's loss to bear the entire burden of compensating all aspects of that loss.

Like S. 687, California's present law retains full joint and several liability for all forms of economic damage. This compromise between the desire to maximize the resources available to compensate an injured party on the one hand and the recognition that it is unjust for a defendant to pay for harm its own conduct has not caused, is both reasonable and responsive to the realities of modern society and the moral precepts of jurors.

The compromise is sensitive to the realities of litigation because of its implicit recognition that efforts to provide "full" economic compensation for non-economic losses are inherently doomed to failure. Non-economic losses can never be fully covered by compensation in any amount. Because juries are aware of that inherent contradiction, the amount and rationality of any particular non-economic damages award is much less predictable. The compromise on joint and several liability incorporated into S. 687 is reasonable because it gives both plaintiffs and defendants what each most needs. It maximizes the plaintiff's prospects for recovering that part of his or her damages that represents actual financial loss and can be fully compensated for by a financial award. It maximizes the defendant's insulation from inappropriate liability by limiting its exposure to the least objective and least predictable part of compensatory damages awards.

California voters and juries understand that the tort system is at base not a "no-fault" system and not an insurance system. Defendants which are at fault are required to compensate for the harm caused by their acts. However, the idea of the "deep-pocket" defendant paying for harm not caused by it goes against the fundamental principles of fairness inherent in traditional tort law. S. 687's provisions regarding joint and several liability are practical and just.

Senator BRYAN. Our concluding witness, Professor Saks, we will hear from you now.

STATEMENT OF MICHAEL J. SAKS, PROFESSOR, UNIVERSITY OF IOWA LAW SCHOOL

Mr. SAKS. I wonder if I could begin by asking one of my fellow panel members to pass a glass of water down this way. And if the members of the committee have my testimony in front of them, there are some tables and graphs in the back to which I may refer. If you do not have it handy, I have put them all together on single sheets of paper.

Senator BRYAN. Professor Saks, could you pull that microphone a little closer to you, sir, so we could have the benefit of your testimony and your comments?

Mr. SAKS. If you do not have my testimony handy, I do have the graphs here, and a staff member could pass them around, then it would be easy to follow me.

Senator BRYAN. We have your testimony, Professor Saks, and we will make the full testimony a part of the record, and you can make any comment from it you care to.

Mr. SAKS. Let me add that although I teach at a law school, I am not a lawyer. I am a social scientist, who is kind of an epidemiologist or statistician of the legal system. Basically, I read a lot of studies from the Administrative Office of the U.S. Courts, the Federal Judicial Center, the National Center for State Courts, Rand Corp., academic researchers, think tank studies, and try to learn about how the tort litigation system and other aspects of the legal system work.

I also cannot avoid reading the popular press, popular books, and occasionally trade publications talking about the very same system. And I have to tell you that when I look at the two batches of statements, you would think that they are describing two different planets. And my only purpose here, and my understanding of what I

was invited to talk about, was to give a little bit of data about the system.

Senator Hollings had referred to important research that had been done in the area of medical malpractice which revealed much that was contrary to the usual statements that were being heard from the 1970's onward. Comparably good research has not been done in the product liability area, so we cannot speak with as much confidence on that.

Although I have included in my testimony a few paragraphs summarizing the medical malpractice data, the only thing I will mention from the medical malpractice findings is that, as a result of the New York study done by Harvard researchers at the request of the New York State Health Department, the actual risk of being sued for committing medical malpractice became known. They also asked New York physicians to estimate that risk and it was found that depending on how exactly you count the data, the physicians were overestimating the actual risk by anywhere from 15 to 30 times. Once one knew what the actual risk was, one could make that comparison.

I basically will relay some findings, some of which you may already be familiar with. First of all, in the Federal courts, a single product, asbestos, has accounted for the lion's share of Federal product liability litigation. In 1988, asbestos cases accounted for two-thirds of new Federal filings—one single product. In 1990, three-quarters of Federal product liability filings were asbestos.

The asbestos blip in the system probably is in decline. Everyone knew that eventually it would be. So that by 1991, it had dropped to 57 percent. The point is that asbestos alone is what has made Federal product liability findings appear to be explosive.

If you remove the asbestos cases from the Federal products liability caseload, what you see, in general, is a decline in raw numbers of filings. It is in decline; it is not exploding. That does not mean it may not explode again if there is a product like asbestos that comes along.

When you turn to the State courts, one does not have anywhere near as accurate data. Federal courts turn in much more precise data. The best you can say about the State courts is that if you look at nonauto torts—which includes just what it sounds like, everything except auto torts—and products liability cases are somewhere in there, that whole category, by the Rand Corp.'s best count of it, has been increasing at about 1 percent per year.

If you look at the total number of deaths and injuries caused by products, and we cannot know, because the research has not been done as it was done with medical malpractice, but one cannot know how many of those are actionable under the law. But there is research, which I cite in my full testimony, which indicates approximately 10 million trips annually to hospital emergency rooms due to injuries caused by products. There are another 23 million injuries that do not result in emergency room visits.

Now, if you use that as a denominator of how many potential product liability lawsuits there are, and then you count up all of the Federal and one's best estimates of State court product liability cases, what you find is not unlike what you find in most areas of

tort litigation. What you find is that only a tiny fraction, under 1 percent of the potential claims, wind up as filed lawsuits.

Let me say something about the awards that are made. We have heard some mention of runaway verdicts. If you look at figure 2 in my handout, the large graph, this is the result of a Rand Corp. study of aircraft crash cases. And this represents both awards and settlements. Contrary to most lawyer lore, there was no significant difference between the amounts settled for and the amounts received at trial.

If you look at the square dots, if defendants were asked to pay the actual economic losses of the plaintiffs, those square dots would fall along the straight line. What you find in aircraft crash cases, you find also in auto crash cases and in medical malpractice cases; it is a general phenomenon of the awarding of damages.

At the very low end you see those square dots are above the line, meaning plaintiffs whose provable economic losses are rather low are receiving several times the amount that they should receive in damages. But as you start to move across the loss spectrum into higher reaches, you see that those dots fall below, and progressively lower and lower. So that the people with the most serious losses are receiving 24 to 28 cents per dollars of economic loss.

This is a very common finding. At the low end, people get windfalls. Once you get beyond the low end, economic damages are undercompensated.

If you add up the net undercompensation just from the 2,000 plane crash victims that Rand studied, you would find a net undercompensation of $650 million—defendants who paid $650 million less than the economic damages were.

What is ironic about this is that Rand was asked to do the study by the aircraft manufacturers because they believed, apparently quite incorrectly, that they were being taken to the cleaners by the products liability system; that jurors were overcompensating plaintiffs and judges were letting the jurors get away with it. But the study that they commissioned showed precisely the opposite.

Rand did a study of all of the losses, all economic losses due to accidents in the United States, and they calculated that Americans lost $176 billion due to nonfatal accidents. It will not surprise you that overwhelmingly this reflects medical expenses and lost earnings—$176 billion in losses.

How much did the tort liability system return to plaintiffs out of that $176 billion—$7 billion.

The tort system borders on nonexistent. If someone arrived from Mars and had not been hearing all of the discussion over the past 10 or 20 years and just looked at the numbers, they would think we were gathered together here to figure out why the system was doing such a poor job of giving access to compensation to people who have been victims of product-related injuries. And they would think that the bill had something to do with trying to increase the utility of the system.

From popular discussion, one would think that punitive damages are a big problem. But the best research that has looked into it quite intensely has found that over the past quarter of a century, 27 States, plus the District of Columbia, plus Puerto Rico, each one of those had fewer than five punitive damage awards in product li-

ability cases in a quarter century ending in 1990. Only 10 States had more than 10 in that quarter century.

I would be happy to answer any questions or perhaps talk about more data, but I do want to say that I would urge the committee not to rely on what I have said here or even what is in my testimony, but I have provided plenty of citations to Government studies and studies by the Rand Corp. and academic researchers, and I think that whatever is decided ought to be based, at least in part, on the reality of what is going on out there.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Saks follows:]

PREPARED STATEMENT OF MICHAEL J. SAKS

For what problem is the proposed legislation a solution?

Judging from the popular press and a surfeit of opinion offered by almost anyone you care to ask, most people believe that the problem of products liability litigation is a problem of plaintiffs bringing too many suits, winning too many of them, and being awarded too much in compensation. The only way to begin to assess the validity of these beliefs is through serious empirical research.

Such research as has been completed is inadequate to provide definitive answers about products liability litigation. For example, no data about the number of suits, trial outcomes, or the size of settlements or awards have any meaning unless one can compare them to the number of actionable injuries out of which the suits arise, the merits of the claims, and the magnitude of the plaintiff's losses. If the pool of actionable injuries is vastly larger than the number of claims filed, then an increase in valid filings indicates a system that is belatedly starting to do its job, rather than one that has spun out of control. If findings of liability generally are consistent with the merits of the claim as indicated by the evidence, then whatever the rate of plaintiff or defendant success, the system would be doing its job properly. When liability is found, if the size of awards are generally in line with the amount of the plaintiff's losses, then no matter how large or small they are, or how they are changing over time, the system would be doing its job correctly.

Unfortunately, the data necessary to provide a clear picture on these questions does not exist. The serious research that has been conducted, however, provides little support for the popular imagery of the behavior of the tort litigation system. Instead, the findings suggest the reality is quite different from the popular image. The number of actionable injuries suffered greatly exceeds the number of claims brought. The main thing to be said about verdicts is that they vary considerably from county to county throughout the country, though in general they tend to favor defendants. And awards, if anything, fall well short of meeting the losses of the more seriously injured victims of injury.

Before summarizing the data on products liability litigation, I will provide a brief example from the area of medical malpractice, which, in the popular imagination, has been thought to be suffering from problems that parallel those thought to exist in the area of products liability. But, because of the quality and extent of the research that has been done there, real answers have been found to many of the important questions about medical malpractice litigation, and as a result many of the myths of a medical malpractice explosion have been shattered. Indeed, the major shortcoming of the medical malpractice quarter of the tort system has been found to be its massive inability to provide compensation where it is due.

MEDICAL MALPRACTICE RESEARCH AS AN EXAMPLE AND MODEL

Research in medical malpractice has taken the trouble to count the number of people receiving hospital treatment, the proportion of those who as a result suffer a medical accident, to measure the seriousness of those injuries, separate them into actionable malpractice and non-negligent injuries, and to follow up how many claims are filed and by which categories of patients, and how those claims are resolved and at what costs. Such research was prompted by criticisms raised by the medical community that sound remarkably like those in the manufacturing community.

Some of the findings of that research are these.[1] Medical accidents kill at least 150,000 people each year. More than half of those fatal injuries are the result of

[1] See, for example: Paul C. Weller, Howard H. Hiatt, Joseph P. Newhouse, William G. Johnson, Troyen A. Brennan, and Lucian L. Leape, A Measure of Malpractice: Medical Injury, Mal-

malpractice. Few victims of negligent medical injury—only about 5 percent—bring any claim for compensation. Table 1 presents the precise relationship between actionable injuries and claims filed in New York State. Most notable is the large number of patients with valid claims who bring no action (only 8 of 280 filed claims).[2] Of those who bring claims that (in the eyes of the defendants' insurers) are valid, half do not prevail at trial. Compensation paid generally falls well below the injury victim's actual losses: For every 1 percent increase in losses, compensation rises only one to two tenths of one percent. The interval from injury to compensation is an average of six years (in New York state); for those with the most serious injuries, the wait is over a decade.

No informed student of medical malpractice litigation any longer believes most of what had been said in the 1970's and 1980's about the nature of the medical malpractice system. Were comparable research to be undertaken on the behavior of products liability litigation, similar corrections of speculative assertions and beliefs might be taking place.

The research that already exists concerning products liability should lead one to pause and reconsider beliefs that have been promoted on the basis of anecdotes and groundless assertions. In what follows I will summarize those research findings.

THE NUMBER OF SUITS AND THE NUMBER OF ACTIONABLE INJURIES

Since about the mid 1980's, a single product, asbestos, has accounted for most of the federal product liability litigation In 1988 asbestos cases accounted for two-thirds of new federal filings; in 1990 three-fourths. The asbestos litigation blip may now have peaked. In 1991 it accounted for only 57 percent of filings. In general it is worth noting that product liability cases are highly concentrated into a relatively small number of industries. A study of federal products liability cases found that a mere 34 companies were lead defendants in over 35,000 suits while 17,000 companies were lead defendants in only one suit each.[3]

Excluding asbestos cases, the number of filings of products liability claims in the federal courts, as can be seen in Figure 1, has generally been moving downward for the past decade.[4] Here are the data on such filings, in thousands of cases:

Year and filings: 1984, 6.9; 1985, 8.2; 1986, 7.0; 1987, 6.0; 1988, 5.2; 1989, 5.1; 1990, 4.9; and 1991, 5.3.

These cases represent about 2.5 percent of all federal civil filings. (For comparison, in any given year there are about eight to twelve times as many contract actions.) Products liability cases represent about one eighth of all personal injury tort cases in the federal courts.

In the states, 27 million cases are filed annually in general jurisdiction trial courts.[5] Of these, about 9 million are civil cases. Of those, about 900,00() are tort actions.[6] These represent about 95 percent of the nation's tort suits. In the state court data, cases are not categorized as finely as in the federal courts. Thus, while we know that the vast majority of the state tort cases concern auto crashes, we have no idea how many are product liability cases. The best we can say is that non-auto torts8 (which includes products cases) are increasing in number at about 1 percent per year.[7]

As noted earlier, the number of filings and trends in those filings over time have meaning only in relation to the number of actionable claims. Although we some idea how many product-related injuries there are—22,000 deaths, 30,000,000 injuries,

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practice Litigation, and Patient Compensation (Harvard University Press, 1993); Metzloff, Resolving Malpractice Disputes: Imaging the Jury's Shadow, 54 L. & Contemp. Probs. 43 (1991); Sloan & Hsieh, Variability in Medical Malpractice Payments: Is the Compensation Fair? 24 Law & Society Review 997 (1990); and other studies- cited in Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?, 140 Pennsylvania L. Rev. 1147 (1992).

[2] The apparently invalid claims filed (39) plus the valid claims filed (8) add up to fewer than 17 percent of the claims that could legitimately have been brought.

[3] Dunworth, Product Liability and the Business Sector: Litigation Trends in Federal Courts (Rand, 1988).

[4] Data compiled by the Administrative Office of the U.S. Courts.

[5] National Center for State Courts, State Court Caseload Statistics: Annual Report, 1990 (NCSC, 1992). Another 74 million cases are filed in courts of limited jurisdiction, but these are overwhelmingly traffic, minor criminal, and small claims cases.

[6] Thus, torts constitute 10 percent of the civil cases in the states' general jurisdiction trial courts. Domestic relations represent 33 percent of the civil caseload, contracts 14 percent, small claims 12 percent, real property 9 percent, and trusts & estates 7 percent.

[7] Hensler, Reading the Tort Litigation Tea Leaves: What's Going on in the Civil Liability System?, 16 Justice System Journal 139 (1993).

10,000,000 requiring trips to hospital emergency rooms[8]—no one has the faintest idea how many of those injuries were actionable under current law, or how that proportion might change if the definition of liability for product injuries were varied by statute or by common law. If we make an educated guess that as many as one tenth of the states' tort cases are products liability, that would place up to 90,000 non-asbestos product liability cases in the state courts.

Adding the approximately 5,000 federal non-asbestos products liability filings to the 90,000 state filings brings us to a total of about 95,000 non-asbestos product liability cases throughout the country—or less than 1 percent of all product-related injuries requiring hospital emergency treatment.

This suggests that what is true in all torts except automobile cases, namely, that only a fraction of those who suffer injuries file claims, is true as well in products liability.[9]

If that fraction has been going up over time—and no one knows if it has been going up, down, or remained level—that easily could be because so many valid claims in the past were never filed (and still are not). The system has been doing such a poor job of providing recourse for those who have suffered compensable injuries that there is vast room for improvement. If a decade ago 1 percent of those with valid claims filed them, and today 2 percent do so, that would appear to defendants to be a doubling in the number of filings. But it still would leave 98 percent of valid claims unfiled and uncompensated.

HOW PRODUCT LIABILITY CASES FARE IN COURT

Court administrators generally do not collect data on the outcomes of the cases. Moreover, for a number of reasons, it is meaningless to look at trends in aggregate outcome statistics. Juries can deal only with what comes to trial, and what comes to trial is greatly affected by changes in settlement practices, which in turn can be affected by changes in the number and nature of actionable injuries, and other changes external to the legal system itself. Perhaps significantly, of all categories of tort cases, products liability claims were the least likely to be contested by defendants and, accordingly, the least likely to require a trial (fewer than 4 percent going to trial, compared to over 11 percent for medical malpractice).[10]

The most impressive thing that has been found by studies of win rates in tort cases is the great variation across jurisdictions.[11] To really do such studies properly, they would have to involve a comparison of specific trial outcomes to the evidence available on the specific circumstances of the injuries. How else could one make an informed judgment about the appropriateness of the verdicts?

With these cautions in mind, it can be mentioned that while, overall, tort plaintiffs win between 55-65 percent of their trials, product liability plaintiffs win well under 50 percent.[12] Rather than randomness and unpredictability in verdicts, Daniels and Martin found systematic and understandable, though complex, patterns of verdicts between injury settings, within settings, and over time. Some basic data from that study are included in this testimony as Table 2. On average these come to slightly fewer than 40 percent plaintiff wins. In addition to win rates, the Table includes the size of awards, the subject to which I turn next.

AMOUNT OF AWARDS OR SETTLEMENTS

The real issue here is how the award relates to the severity of the victim's losses. The promise of tort law is to "make whole" the successful plaintiff under those conditions where the law has determined that the burden of those losses should be shifted from the innocent victims of accidental injury to their injurers. Where defendants pay more than is required to make an injury victim whole, or where they pay less, an injustice is done. To answer the question of how "accurately" plaintiffs are being compensated when it is appropriate that they be compensated, it tells us

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[8] U.S. Consumer Prod. Safety Comm'n, Ann. Rep.; National Injury Info. Clearinghouse, Nat'l Electronic Injury Surveillance Sys., Table of Bodypart by Age, All Products, Calendar Year 1989, at 5 (1989).

[9] These are just approximations of the rough magnitude of product injuries and filings. Even if I am off by a factor of five or ten, and the real rate of filings per actionable injury is really 5 percent or 10 percent, the point remains the same.

[10] Rottman, Tort Litigation in the State Courts: Evidence from the Trial Court Information Network, State Court Journal, Fall 1990.

[11] See review in Saks, supra note 1.

[12] Shanley & Peterson, Comparative Justice: Civil Jury Verdicts in San Francisco and Cook Counties, 1959-1980 (Rand, 1983); Daniels and Martin, Don't Kill the Messenger 'Till You Read the Message: Products Liability Verdicts in Six California Counties, 1970-1990, 16 Justice System Journal 69 (1993).

nothing to count how many million dollar awards there are, or the mean or median award, or how those averages are changing over time. The only way to answer the question is to compare the amounts awarded in specific cases with the losses suffered by the injury victims, and to assess how on or off target the amounts are.

Such studies[13] are few and far between, but they do form clear patterns with which students of the subject are familiar:

(1) Jury awards and settlements both are highly correlated to the actual losses suffered.[14] Accident victims with more severe injuries and losses systematically receive larger awards or settlements than those with less severe injuries and losses.

(2) Within each level of injury or loss there is a good deal of variation, or noise, in the award or settlement amounts. This likely is due to genuine controversy between the parties over economic damages, the inherent ambiguity in the value of pain and suffering, and different judgments among jurors, as well as among attorneys and insurance adjustors, over these matters.

(3) At lower levels of the injury or loss spectrum, awards and settlements tend to overcompensate the plaintiff. At relatively higher levels of injury and loss, plaintiffs tend to be undercompensated.[15] This familiar finding is frustrated by the results of a Rand Corporation study of awards and settlements in air crash cases.[16] The straight line in Figure 2 represents the actual losses incurred by the air crash victims. The other line shows the amounts paid in awards or settlements. As we can see, for the lower value cases, there is considerable overcompensation, while for the higher value cases there is considerable undercompensation.

(4) On average, defendants pay to successful plaintiffs far less than the total of the plaintiff's economic losses. In the Rand aircraft accident study, this proportion came to slightly less than 50 percent of their losses. Table 3 gives in numbers the same data that appear in Figure 2. We can see from this table that defendants are required to pay, in total, far less than the losses they imposed on the injury victims. For the 2000 or so cases represented in these data, the net aggregate underpayment is more than $650,000,000.

It may be worth noting the findings of a major Rand Corporation study of accidental injury in the United States.[17] In a recent past year, Americans suffered a total of $176 billion in losses (mostly medical expenses and lost earnings) due to non-fatal accidental injuries. Through the tort litigation system only $7 billion of that was compensated—less than 5 percent. The rest of those losses, the vast bulk of them, were paid by the injury victims or their employers through worker's compensation or first party health and accident insurance, or by the taxpayers, or out of the pockets of the injured themselves (38 percent of the total sum). This is hardly a system in which every time there is an injury people look to a corporate defendant to pay the bill.

These findings have several implications for legal policy. One is that pain and suffering awards contribute to closing the gap between actual losses and the typical underpayment of those economic losses. Thus, efforts to cap pain and suffering awards work to undo what now works as a rough corrective to undercompensation of economic losses. More generally, caps exacerbate the injustices at both ends of the loss distribution: They leave untouched the windfalls to those with relatively small losses. And they cruelly reduce still further the undercompensation of those with the gravest losses. Far, far more decent and effective reforms are possible, notably comparative review of damage awards to assist judges in making additur and remittitur adjustments to awards.[18]

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[13] Peterson, Compensation for Injuries: Civil Jury Verdicts in Cook County 34-37 (Rand, 1984); Sloan & Hsieh, supra note 2; Conard et al., Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation (1964); Kakalik et al., Costs and.Compensation Paid in Aviation Accident Litigation (Rand, 1988); King & Smith, Economic Loss and Compensation in Aviation Accidents (Rand, 1988).

[14] The Rand Corporation study cited above found jury awards to correlate .71 with a simple measure medical expenses.

[15] Recall the finding from medical malpractice that for every 1 percent increase in victim's losses, there is only one to two tenths of one percent increase in the award or settlement amount.

[16] It may be important to note that Rand's economists employed the one of the more conservative measure of losses that could reasonably have been employed.

[17] Hensler et al., Compensation for Accidental Injuries in the United States (Rand, 1991).

[18] David Baldus, John MacQueen & George Woodworth, Improving Judicial Oversight of Jury Damage Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages (Final Report to the State Justice Institute, September 20, 1993).

PUNITIVE DAMAGES

The subject of punitive damages probably represents the greatest gap between what actually is going on in the tort system and what is commonly believed to be going on. While apparently it is widely imagined that punitive damages are being awarded routinely and in amounts that are soaring, every serious empirical study of the question has failed to support those conclusions.[19] The studies are unanimous in concluding that the frequency of punitive damage awards has grown only slightly. For products liability cases other than asbestos, in recent years the frequency has actually dropped. Though the average size of awards seems to have increased over time, the change is not meaningful unless we control for the facts of the cases to see if punitive awards were warranted (perhaps the later cases were more egregious than the earlier cases) and the wealth of the defendant, which is a proper basis for assessing punitive damages (perhaps later cases involved wealthier defendants).

We need to ask whether punitive damages are a problem or whether they are the solution to a problem. We cannot evaluate the wisdom or justice of assessing punitive damages unless we know more about the cases in which those awards have been made. Which deserved the punitive award they got, which did not? We might also want to know about the other side of the coin: How many tortious product injuries might justifiably have involved punitive awards but did not receive them (or did not even become filed cases)?

The most recent major study of punitive damages in products liability cases found that nearly every case involved death or serious injury and only 7 percent involved plaintiffs who were contributorily negligent. The actions of the defendants against whom punitive awards were assessed typically were flagrant (fraudulent affirmative misconduct, knowing violations of safety standards, failure to warn of known dangers, or post-marketing failure to redesign, recall, or reduce the risk of known danger).[20]

POST-TRIAL ADJUSTMENTS

Whatever the statistical picture is that is produced by trials, it is now well recognized that post-trial adjustments tend to skew the numbers even further in favor of defendants. Remittitur is more common and more pronounced than additur; punitive awards are set aside or reduced.[21]

CONCLUSIONS: THE REAL WEAKNESSES OF THE TORT SYSTEM

Serious research on the behavior of the tort litigation system has begun to reveal problems in the system that are quite different from those the public, state legislatures, judges, and the Congress usually are told about on the strength of anecdotes, speculation, and superficial consideration of fragmentary data.[22]

1. The tort litigation system plays a remarkably small role in the compensation of people who suffer tortious injuries and illness (except in auto crash cases), and it would be astonishing if the same were not also true for products liability.

2. A reasonable calculation is that only a small fraction—under 1 percent—of those injured by products ever file a claim for compensation.

3. Plaintiffs fare less well at trial in products liability claims than they do in most other kinds of tort litigation.[23]

4. Jury awards as well as negotiated settlements overcompensate those with small losses while undercompensating those who have suffered the largest losses.

5. In light of the preceding findings, we can see that the tort litigation system for products liability, as well as more generally, falls far short of its compensatory goals, and for the same reasons may fall short of its deterrence goals as well.

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[19] See Landes & Posner, New Light on Punitive Damages, Regulation, Sept-Oct. 1986; Peterson et al., Punitive Damages: Empirical Findings (1987); Daniels & Martin, Myth and Reality in Punitive Damages, 75 Minnesota L. Rev. 1 (1990); Rustad, Demystifying Punitive Damages in Products Liability Cases: A Survey of A Quarter Century of Verdicts (1991).

[20] Rustad, id.

[21] Shanley & Peterson, Posttrial Adjustments to Jury Awards (Rand, 1987); Henderson & Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479 (1990); Rustad, supra note 20.

[22] On the strength of those speculations, state law and the federal courts already have altered state products liability law, and tort law generally, to improve the position of defendants even more than the system generally does. See Henderson & Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479 (1990); Eisenberg & Henderson Inside the Quiet Revolution in Products Liability, 39 UCLA L. Rev. 731 (1992); Koenig & Rustad, The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability, 16 Justice System Journal 21 (1993).

[23] Only medical malpractice defendants fare better.

Although the data I have summarized in this testimony cast a good deal more light on the reality of the nation's tort system than the anecdotes, speculations, and empty assertions that have typified discussions of this subject, the data remain inadequate to provide more definitive answers to many of the basic questions the Congress might want answered before it proceeds with major re-writing of the nation's products liability law. If this is a problem important enough to be giving serious attention to, it is a problem serious enough to seek serious and definitive answers. The Congress might consider funding such research, much as the Commissioner of Health for the State of New York did when he contracted with researchers at Harvard University to study New York's medical malpractice problems. That research produced the important results I cited near the beginning of this testimony.

Were the Congress, through OTA, SJI, NU, NSF, or some other agency, to support such work, this committee might be surprised at how much clearer the facts, if not the solutions, could become.

FIGURE 1—TRENDS IN FEDERAL CIVIL FINDINGS, 1984–91

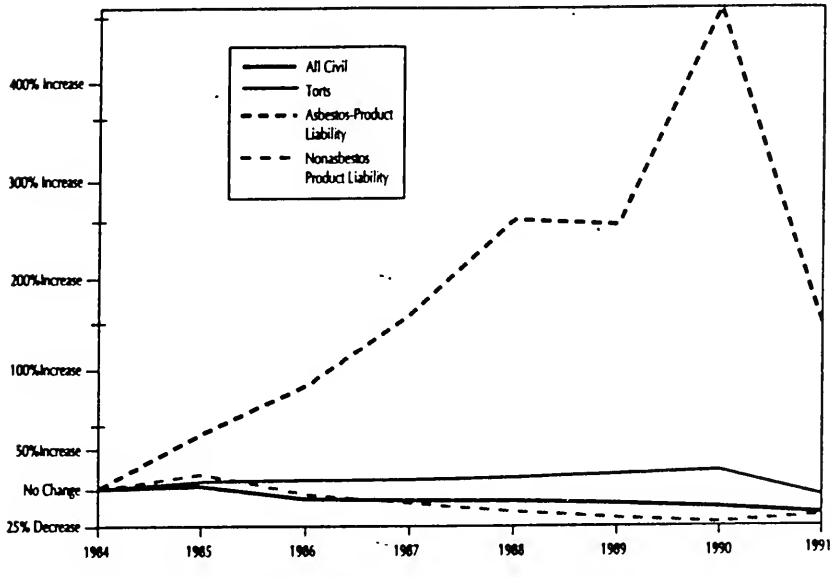

FIGURE 2—COMPENSATION AS A FUNCTION OF ECONOMIC LOSS

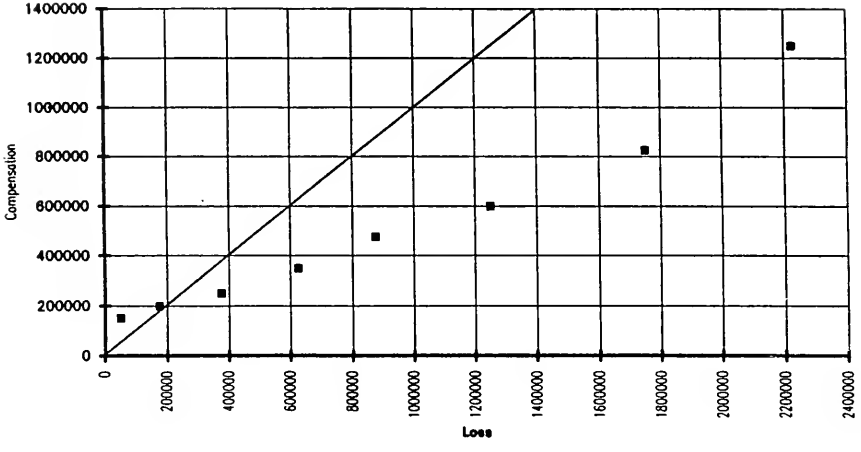

Table 1.—Medical Accidents and Claims

	Claim filed?		
	No	Yes	Total
Negligent adverse event	272	8	280
No negligent adverse event	29,802	39	29,841
Total	30,074	47	30,121

Table 2—Products Liability Verdicts: Plaintiff Win Rates and Size of Awards by Setting

Setting	No	Win rate (percent)	25th percentile	Median	75th percentile	Mean
Work	573	41.7	$171,000	$345,000	$937,125	$787,487
Vehicle	258	38.4	217,789	708,624	2,129,998	2,239,100
Home	177	34.5	41,960	94,080	362,297	414,027
Recreation	54	38.9	35,618	65,775	593,391	588,375
Medical	50	46.0	131,307	317,714	1,211,250	1,063,603

Table 3—Aggregate Over- and Under-Payment in the Air Crash Cases Sample

Economic loss to survivors (in 000's)	Total over- or (under-) payment	Economic loss to survivors (in 000's)	Total over- or (under-) payment
0– 99	$50,945,040	750– 999	(51,225,426)
100– 249	6,625,120	1000–1499	117,599,154
250– 499	32,026,917	1500–1999	101,108,945
750– 999	51,225,426	2000–plus	368,059,030
Total			650,273,216

The CHAIRMAN [presiding]. Thank you very much, Professor Saks.

Senator Gorton.

Senator GORTON. Ms. Smith, I wonder if your experience or people with whom you deal is sufficiently broad across State lines to tell me whether or not there is any significant dynamic in the way cases are settled, cases are tried or the way in which fairness in

compensation results in the product liability field between that great majority of the States which allow punitive damages and the relative handful, like mine, which just do not have that as a part of the system at all?

Ms. SMITH. Senator, I can talk about some States. Actually, I am admitted in the State of Washington to practice, and I have tried some lawsuits up in Washington State, so I know about Washington State, where punitive damages are not allowed, and certainly in California they are and in some other jurisdictions where I have tried lawsuits.

There are concerns about punitive damages for any defendant that is being sued, and punitive damages are pled. It is impossible to insure, for example, in California against punitive damages. So, immediately you have a whole different area for a defendant, where there is insurance, mostly, at least in my experience, for the compensatory, and then you have the punitive aspect of it, where there is no insurance.

So, it does escalate the controversy, if you will, to another dimension, to add the component of punitive damages into the equation, when it is not there in Washington State. It is just not there. And so it is not something that the plaintiff can use as leverage, if you will, at the bargaining table.

It is, Senator, I believe, appropriate in circumstances, where the standards are clear, to have punitive damages claims and punitive damages issues on the table, where it is clear that you are not talking about a negligence-based type of conduct or a wrongful decision. So, I do not—as long as the standard is clear, I do not think that the plaintiff can have an unfair, necessarily, advantage.

Senator GORTON. My question was: Are settlements, on the average, markedly lower in Washington or in such States? Is there any different dynamic when you actually go to trial? Do juries, in the marvelous psychology to which you referred previously, in a State like Washington, perhaps tend to give a little bit more in noneconomic damages because they do not have the authority to award punitive damages? What is your experience in that?

Ms. SMITH. That has not been my experience, Senator—that juries in Washington would make a different decision on the basis of the facts and evidence as would a jury in California.

I would like to say that California has improved its system to be—actually, to parallel the Senate bill. We used to have the punitive damages, evidence and information about corporate worth, et cetera, in the same trial as the compensatory elements, proof, et cetera.

It has now fairly recently been bifurcated so that you can put on the whole case in front of the judge and jury, see if there is a verdict for the plaintiff, and then go into the punitive damages phase. Which I feel is a significant benefit because you do not have the mixing, you do not have the appellate threat, that the defendant is going to appeal this because we have been tainted, because this—essentially, punitive damages information has come before the jury before they made the compensatory determination.

So, I think that is a better system.

Senator GORTON. Ms. Gilbert, yours is a national organization. Do you have any studies or any strong views on whether or not

compensatory schemes are dramatically different in nonpunitive damages State from punitive damages States?

Ms. GILBERT. I have never seen any kind of study to that effect. It would be a difficult one to do because so many of the cases—unless you just want to look at jury awards—so many cases are settled, and they are settled in secret—something we would like the Congress to address and look at—that unless you go to the insurance industry and get information from them, it is not going to be something that a layperson can just go look up.

If you look just at jury awards, I believe, and I am not a statistician at all, but that you are going to have trouble getting a statistically significant sampling to be able to make that judgment. Because punitive damages are awarded so infrequently in product liability lawsuits, so that it would be very difficult, I think, to make any kind of assessment, if you are just looking at jury awards.

Senator GORTON. Mr. Schwartz, do you have a thought on that subject?

Mr. SCHWARTZ. There is really no showing that I know of that in Washington or in Massachusetts, which limits punitive damages to very few incidents, that there is any greater wrongful behavior, wrongful acts, or bad products produced within those States than States that have the punitive damage system.

I would like to address very quickly a question that was raised on the last panel and it was left up in the air. And that is, if the standard is conscious, reckless disregard, how can we sit here and ask for protection for somebody who is engaged in conscious, reckless disregard of safety? And the answer is, we are not.

The standard in the bill is conscious, flagrant disregard of safety. By way of contrast, in many States the standard is very muddled. We can supply the committee and show that the standards on punitive damages in this country are not uniform. They vary all over the place. And as well as telling the jury what the punitive damages award should be based on, it is also important to do something that this bill does that Ms. Smith pointed out—tell them what it is not to be based on. It is not ordinary negligence.

So, that is why this bill is needed in that particular area.

Senator GORTON. Ms. Gilbert, one more question for you. You have used figures that I think we have heard before that say that product liability costs are considerably less than 1 percent of total manufacturing expenses. You can correct me if I am wrong, but that, of course, I assume, includes all manufacturers including those of paper products and paper clips and the like, the multitude of products in which the subject would simply never come up.

Do you deny or dispute the truth of the proposition presented here by Senator McCain earlier that product liability has had a dramatic effect in coming close to destroying the private aviation manufacturing industry in the United States?

Ms. GILBERT. I am not an expert in general aviation. But I have been involved in some hearings on that topic in the Congress. And experts that I have heard testify do not lay the blame for the problems in our general aviation industry at the doorstep of product liability. But that, in fact, we have a lot of old planes that are out there but that are still flying quite well, and that we just do not have the market that we once had for people wanting to buy an-

other airplane, you know, every 5 or 7 years, maybe like you buy another automobile, and that there are many other pressures on the general aviation industry that has caused the shrinking of our industry over the last years.

I would also say that if there is a problem with liability in the general aviation industry, I would think we should look at the insurance industry because that is where manufacturers' cost and expenses come out in the product liability area, is in their liability insurance. And we have seen over the years where product liability insurance has skyrocketed without basis. If you look at their payouts, there is no reason to have jacked up their premiums the way they have over the course of the last few decades.

Senator GORTON. Of course, if the manufacturer does not like the premiums, he can self insure, can he not?

Ms. GILBERT. It is not all that easy to self insure. Some manufacturers have left the product liability insurance market because of that. But what we often see, and I heard it on the previous panel, too, that so many helmet manufacturers have left the business, yet they never had a claim. Well, something is wrong if you have never had a claim and yet you cannot find insurance. Why is that? And perhaps we should look at the insurance market a little more carefully.

This committee has, in the past, supported an amendment that would require the insurance industry to report to the Federal Government, data on their premiums and payouts and exactly how product liability laws affect that. And that is a very important component to look at when you are looking at these individual industries.

Senator GORTON. Mr. Schwartz, do you have any views on the general aviation market and the impact of product liability?

Mr. SCHWARTZ. Yes, Senator. One of the interesting data points that they can prove is as the number of accidents went down their product liability costs in terms of verdicts went up.

And I would also like to—just to concur with something you said about self insurance. More and more companies now self insure. Because of the work of this committee in 1981 and 1986, smaller businesses can group together in something called risk retention pools. The premiums in risk retention are now in the billions of dollars, starting out very small in the beginning. So if a company feels—and these are businessmen and women just like you saw on the other panel; they are practical people in business. They are making practical judgments. And if they feel a commercial insurer is giving them an unfair rate, they either can self insure, if they are large enough, or if they are too small they can join in a risk retention group.

Senator GORTON. But the actual risks, the actual costs, have gone up dramatically in any event.

Mr. SCHWARTZ. That is right. There has been some reduction in costs in some situations with risk retention, but there is not a tremendous gap between risk retention groups and commercial insurers. What you put into the law, very wisely, was a market self corrective for the insurance rates and premiums. And, by the way, the NICO survey, which is a very interesting survey to read, does not

include those who are self insured. It only includes the commercial insurers which would change the figures somewhat.

Senator GORTON. Mr. Chairman, I am out of my time. Thank you.

The CHAIRMAN. Senator Mathews.

Ms. GILBERT. Mr. Chairman, I just want to correct something for the record, because the figure that I cited of four-tenths of 1 percent of total product retail sales does take into account the estimation of companies that self insure. That is, about one-third of the industry self insures, and Bob Hunter did include that.

Mr. SCHWARTZ. But he does not have their figures. He speculated.

Ms. GILBERT. It is an estimate.

The CHAIRMAN. Senator Mathews.

Senator MATHEWS. Thank you, Mr. Chairman. I would like to think out loud with the panel for just a moment about something that we might refer to as intervening causes and whether there is any place for this consideration of these causes in product's liability. And, Ms. Smith, you referred or got close to the question I wanted to ask you earlier. Ms. Gilbert presented a specific situation that I want to think through with her for a minute, and then put it in perspective.

In the Fair case in Kentucky, in your summary here and in your presentation you concluded that because Ford had not done something—put a grill or whatever it was around the gasoline tank, that Ford was totally responsible. And this may be the case. But that happens to be a sister State of mine, and I remember that accident very well, and I believe the circumstances of that was that the driver of the automobile that hit the bus was driving under the influence of alcohol and was convicted later for that.

I am not sure whether I remember this part of it correctly, but was the driver going the wrong way on the street?

Ms. GILBERT. I believe so. I believe it was a drunk driver that hit the bus head on.

Senator MATHEWS. Now, when Ford, and in talking about a situation, and I am not arguing, I am looking for a point, but I am trying to put it in perspective and see whether there is a need for modifying the laws in a certain way. When Ford built that truck you indicated to us that it was built according to the present standards that were in operation at the time.

Ms. GILBERT. That is true. The standard was due to change in about 2 weeks, well known to Ford.

Senator MATHEWS. But today, if, when there is a defect of some type detected in a product, I believe that what we require today is that that product be recalled from the market and adjustments made or modified or whatever. But we have taken an additional step in this process today, which did not exist then, I take it.

Ms. GILBERT. That was in 1977, and the Motor Vehicle Safety Act was on the books by 1977. And so I think the defect laws that you are referring to were, in fact, on the books. It is true, we have a law that allows the Federal Government to ask for and even order a recall for defective automobiles—excuse me, for automobiles or vehicles that do not meet Government standards. The bus did meet Government standards. The standard was about to change

and was well known to Ford, and generally what does happen with Government standards is it lags behind technology and knowledge of experts. And so one of the purposes of the product liability system is to be there to encourage manufacturers to go beyond Government standards when they know there is a safer way to make a product.

Senator MATHEWS. Well, this is true, and I am not faulting that. I am saying the only way Ford could have done something 2 weeks earlier than it did was to have recalled that product and modified it. I mean, it was already on the street. It was already being utilized by the school system. It was out there, and the only way that they could have prevented this at that point while they were in the process of modifying the way they produce these vehicles was to recall that particular bus and put that grill on it.

Ms. GILBERT. What we believe Ford should have done is put the grill on when they produced the product on March 23, because if they had—if the product had come off the assembly line about 2 weeks later, after April 1, they would have had to put the protective cage on. They knew about it. They were presumably retooling in order to do that. If they had waited 2 weeks and put their protective cage on, most of the people in that accident would probably not have died in that accident. And that is what we believe Ford should have done and what we hope the product liability system taught them to do in the future.

Senator MATHEWS. At the same time, would you agree that those 18 people would not have died had there not been a drunk driver going the wrong way on that street?

Ms. GILBERT. Yes.

Senator MATHEWS. Ms. Smith, would you like to comment on are there causes such as this that ought to be taken into consideration?

Ms. SMITH. Yes, Senator, and that is exactly what happens in California under the fault allocation system is that each defendant presents his case, its case, its case to the jury, and the jury assigns the amount of fault according to the evidence. And in this case, if there was a drunk driver on the wrong side of the road, he would be on the jury form and the jury would allocate the amount of fault, listening to all of the evidence, which of course we cannot do here, but listening to all of the facts. And then, they would assess what, if any, contribution Ford's design or decisionmaking process contributed to that accident.

And so you would have an allocation, if the jury decided that Ford was reasonable in making those decisions and that that is all they could do at the time, a sort of state-of-the-art defense, then Ford might get a defense verdict. If they decided, as my colleague has said, that Ford should have known and should have done something differently and better at that time, then presumably the jury would allocate a percentage award. But it would not be 100 percent to either one under the California system, depending on the facts.

Senator MATHEWS. It appears to me that this is the type of situation that this bill is attempting to remedy, where we go too far in terms of holding a single—I mean, a manufacturer might be liable for something that happened on down the line that he could not

foresee, and I am not saying this could not be foreseen in this situation, but there are some other situations where it could not.

Mr. Schwartz, would you like to comment on that?

Mr. SCHWARTZ. Yes, I would. As you pointed out, Senator, in that case one of the principal causes was a drunk driver who was driving on the wrong side of the road. The present system discourages such people from adequately insuring because they know there is a deep pocket like Ford or another large company where the plaintiff can get 100 percent of the money, even though a jury, which my friend Ms. Gilbert and others often point to as so important, the jury system, a jury has made a determination that the deep pocket is only 40 or 20 percent responsible.

I think under this bill one sound public policy result is it encourages people who put those drunk drivers on the road to have adequate insurance because the will know that a plaintiff's lawyer to get his 100 percent will have to go after them and take away their business, if necessary, to get that full award. The present system does not do that. You simply can go after the deep pocket, get your 100 percent, and that is it.

Senator MATHEWS. Mr. Chairman, my time is up.

The CHAIRMAN. Mr. Schwartz, how did that Kentucky case come out? Am I to understand that they found against Ford?

Mr. SCHWARTZ. It was settled, Mr. Chairman.

The CHAIRMAN. But you did not have a runaway jury on deep pockets?

Mr. SCHWARTZ. You did not. It was settled, but unfair joint liability rules are a factor in settlement; 95 percent of the cases are settled. Only 5 percent go to trial. But I have more knowledge now than I did actually when I first started here. I came from the teaching profession. In the past 12 years I have been practicing law. And let me share with you something that you know as a practicing lawyer, too. Whatever the law is becomes a very important determination in settlement. And so where Ford knows that the law the State allows full joint liability, it is going to be more likely to pay more than maybe it should because of the joint liability principle. A case does not have to go to trial for joint liability to be a factor.

The CHAIRMAN. Well, on that score, what I have discovered after the 45 years that I have been involved in the practice of the law one way or the other, and I qualify as Ms. Smith has done on both sides, if you really want to learn anything about defendants and defendants' practices and settlements and the trial thereof of the cases, represent the local public transit system.

I represented the South Carolina Electric and Gas System, and I did it on a bet because I was winning the verdicts and told the head of the company who had been a law professor, I said, "Look, you have got a lazy bunch. They will not try their cases. They settle them out." And I said "Look at the Christmas Club that they have. You can begin just before Thanksgiving, about the middle of November, Senator, and everybody starts falling down. In the aisle they slip up on some kind of materials, they get their arms caught in the door, and it is Christmas time." And those defendant lawyers do not like to try those cases.

I tried every blooming one of them, kept them there almost till Christmas Day, and went in through January and saved them millions of dollars, and that broke that crowd. And so do not blame the law and the system. Let us look at the individuals and the settlements, because I know it intimately and tried it on both sides.

Now, with respect to Professor Saks, Mr. Schwartz made me a social scientist last year. In fact, he says we are going to have a family reunion. He did his best to exclude me from the family. [Laughter.]

I had a lot of burdens, Victor. Last year, one was, of course, we have got the most Republican State. They do not like democrats. All the pollsters will tell you that. They did not like incumbents, and I was an incumbent. Otherwise, they do not like taxes and I had recommended a value-added tax when I testified before the Finance Committee—to avoid the recession, trying to get on top of the deficits, which the gentleman from Alabama attested to just a moment ago would favor just exactly that, a vat to try to pay for this health care because here we are starting another entitlement and not paying for it. And otherwise, on product liability, you ran me around the State with my opponent on product on product liability.

In South Carolina, we have the best of the best—Ford, DuPont—used to have five. They had 15,000 employees there at Savanna River Plant. Never a product liability claim. More recently, I am trying to get Mercedes Benz and take them into Bosch.

Bosch, incidentally, makes all of the antilock break systems for General Motors, for Ford, for Chrysler, for Toyota. And you walk in and they put coverings over the shoes and the smock around and the headcovering and everything else and I turned to the production manage there and I said how many product liability claims have you had? They had been there for 10 years, at least. How many product liability claims have you had on your antilock breaks or any other—your fuel injection?

He said: "None." He first asked me what was I talking about. He had not heard about it. And then he said "None."

I said "That is pretty good. I am glad to hear it."

He said "Oh, no, no. We would never have such a thing."

I said, "You would not?"

He said "No. Come here." And he showed me a little serial number on every one of the antilock break systems. He said we would know immediately where to go if there was a defect on this thing. And so we do not have those claims.

And so I survived because product liability law has survived. There is not any question in my mind we have got the finest degree of care with respect to manufacture in this country. We have not put them out of business. If they had been put out, they should have been put out. In talking about competition worldwide—we have got 100 German industries—Senator Mathews, you have got 93 Japanese industries, and you beat me in Tennessee. I never have, in the attraction in talking to every one of them heard one of them complain about product liability. We just got Fuji the other day, the finest film plant in the world. They never mention product liability. I have to come to Washington to hear it is a crisis.

Now, going right to the insurance, oh, they have had the thorough studies. They have gone all over and they have not recommended one thing—namely, the uniformity of insurance. That is going to pay the bill. They are going to say we are going to cap insurance and all these other things, but it is State-regulated insurance, and they have not been able to get the information to determine what the actual costs are. That is why we have got the Rockefeller insurance data collection amendment, Ms. Gilbert. You mentioned that. But they do not want uniformity on insurance companies, which is an interstate commerce. They want that State regulated and all the duplicity and the bureaucracy and the different claim forms.

They want one form now for the 50 States to try to implement that. It is just like you are trying to get here with product liability. You are going to find more bureaucracy in everything else. If there ever was federalization it perhaps should go to the insurance and not to the product liability which is not a crisis, but insurance and health care are.

The hour is late and unless you have further comments, we can close the session, but I do not want to cut anybody off. If anyone does please make it short because it is way past the lunch hour and everybody wants to go.

Yes, sir.

Mr. SAKS. Well, as the only member of the panel who did not get a chance to comment on Mr. Mathews' question, I did want to say that on joint and several liability you really have a painful problem of distributive justice. Ford was 1 percent responsible, the drunk driver was 99 percent responsible, but the children and their parents were zero percent responsible. And the question is who should bear the burden of that loss.

Existing law says it should not be the children and the parents. It should be one of the wrongdoers.

Thank you.

The CHAIRMAN. Well, good enough. You witnesses and everybody have been very good to come and indulge us and we appreciate it.

The Committee will be in recess subject to the call of the Chair.

[Whereupon, at 1:20 p.m., the hearing was adjourned.]

APPENDIX

PREPARED STATEMENT OF SENATOR PRESSLER

Mr. Chairman, thank you for this opportunity to participate in this hearing even though I do not sit on this subcommittee. The subject of product liability reform has been a subject of great interest to many businesses in my home state of South Dakota and throughout the nation. I am not alone in my interest in this topic. Many of my colleagues, both former and current Senators, have worked tirelessly to pass reform legislation. Every Congress, a new bill is submitted, hearings are held, but ultimately nothing is passed. With this bill, I think we are closer to passage that ever before. It is imperative for small business—and all business—that something be done now.

For many years, America has faced a product liability crisis. The present judicial system for resolving product liability disputes and for compensating injured parties is inequitable, inefficient, and imposes huge costs on American businesses. In fact, nationally the cost of product liability insurance is 15 time higher times in this country than it is in Japan, and 20 times higher than it is in Europe. American business will not be able to maintain or gain back its competitive edge in international markets if we do not act quickly to correct this situation through passage of this legislation. It is vital that Congress unshackle U.S. companies from the current product liability burden and eliminate this serious competitive disadvantage.

This point was brought home to me a few years ago when I was touring a friend's manufacturing business in Phillip, South Dakota. Art Kroetch the owner of Scotchman Industries explained to me that his manufacturing business pays twice as much for product liability insurance as it spends on its entire Research and Development department. This situation is not unique to South Dakota businesses. Nationally, money spent by small businesses defending frivolous lawsuits and for the purchase of product liability insurance is diverted from reinvestment in their core business.

Mr. Chairman, I think it is important to point out that this legislation is not opposed by all attorneys. I have spoken with many lawyers within the American Bar Association who support tort reform. I believe the legislation we have before us today is a fair and equitable approach to resolve the differences between lawyers and business.

Again, I thank the Chairman for allowing my participation and look forward to the testimony of our distinguished witnesses.

S. 687 is different from past proposals sought by business groups that were considered too pro-defendant. The main focus of this bill, however, is plaintiffs rights. This bill does not place any limit on the amount of punitive damage awards, nor does it take away the jury's right to decide punitive damage awards. It does not contain a broad statute of repose for consumer products, unlike the European Economic Community which has a ten year statute of repose for all products. The statute of repose in S. 687 is 25 years for capital goods alone. This statute would prohibit a claim only if the claimant is eligible to receive workers compensation benefits for the harm done.

S. 687 also includes an amendment I offered to earlier product liability bills which modifies the doctrine of joint and several liability. For too long, businesses and consumers have been victims of the joint and several liability rule. Otherwise known as the deep pocket rule', this provision enables a plaintiff to force any defendant to pay all the damages incurred even if that defendant is only minimally at fault. This provision is consistent with the California-law approach which requires that each defendant will be liable for non-economic damages in proportion to the defendant's responsibility for the harm.

LETTER FROM PAUL CITRON, VICE PRESIDENT, SCIENCE AND TECHNOLOGY, MEDTRONIC, INC.

SEPTEMBER 22, 1993.

Mr. SHERMAN JOYCE
U.S. Senate,
Washington, DC 20510

DEAR TIGER: I very much enjoyed our meeting on September 21, 1993 in conjunction with my presentation before the National Academy of Engineering's symposium concerning the product liability problems of so-called "remote suppliers."

As my comments indicated, Medtronic and other medical device manufacturers are very concerned that this problem may well impact on the health of our patients in the not too distant future. I also very much appreciated your last minute request for me to testify on this issue before the Consumer Subcommittee of the Senate Commerce Committee. I am sorry that events transpired to make this testimony impossible on such short notice, but as the head of Medtronic's Washington Office, Dominique Cahn, and our Washington Counsel, John Dill, explained to you, a further check of my schedule made it clear that I would have virtually no time to prepare my comments and assemble the sort of research and facts that I felt would be necessary to present a quality presentation to the Subcommittee. While I won't be able to be at the hearing on Thursday, you do have a complete copy of the remarks that were made at the symposium.

I am not an expert on the politics of Washington, or the legislative history of attempts to change product liability laws. I do know that this is a fiercely contested issue, with emotions running high on both sides of the question. It would serve neither Medtronic nor the Committee to have this subject aired in less than a comprehensive manner. To that end, I would very much like to work with you on these issues, and would be willing to present this issue to the Committee at a future date.

I am sorry if my scheduling and preparation problems have caused you any difficulty, but I am sure you understand my situation given the short notice.

Sincerely yours,

PAUL CITRON,
Vice President, Science and Technology.

PREPARED STATEMENT OF JAMES L. VINCENT, CHAIRMAN AND CEO, BIOGEN, INC.

Mr. Chairman, Members of the Committee, I thank you for this opportunity to present my views on S. 687, the Product Liability Fairness Act. I commend the Committee for its persistence in taking up this important topic again, which is particularly important this year as we debate the role of the biotechnology industry in our health care system.

Let me begin by telling you a bit about my company and my experience. I am the chairman and Chief Executive Officer of Biogen, Inc., a biopharmaceutical company principally engaged in developing and manufacturing drugs through genetic engineering. we are one of the oldest and largest of the nation's biotechnology companies, with revenues generated by worldwide sales of five products, including alpha interferon and hepatitis B vaccine. Biogen is currently developing and testing products for treatment of heart disease, multiple sclerosis, AIDS, cancer and other diseases and conditions.

Dollar for dollar, biotechnology companies are producing far more breakthrough products than traditional pharmaceutical companies, and they are producing them for about half the investment. Due to the uniquely demanding nature of the American regulatory system, however, it still costs a biotechnology company an average of about $125 million to bring a drug to market.

Our shareholders take substantial financial risks by betting that we can overcome imposing scientific and regulatory hurdles. For instance, Biogen bet about $60 million on what we believed to be an extremely promising AIDS drug. Regrettably, it just did not work.

We take these risks and do not ask for a bailout. Instead, we did what our industry does and we went back to the drawing board and discovered a new approach for a new AIDS drug that we hope to begin testing next year.

We are prepared to succeed or fail based on our estimates of the strength of our science and the size of markets.

I am not prepared to bet the future of Biogen on the random lottery of the American product liability system. Our revenues simply are not strong enough to support a move into product development areas that inherently involve billions of dollars of potential liability. I myself have made the strategic decision not to pursue the devel-

opment of an AIDS vaccine in the current environment because I have made a business judgment that there is a significant likelihood that the courts would bankrupt the company by awarding large judgments to sympathetic plaintiffs regardless of whether the vaccine actually caused the injury.

I know that you have heard from opponents of this bill that product liability awards do not influence business judgments. That is simply not true. what is true is that most corporate executives will not come forward because they are concerned with of fending some constituency that might be important to their business.

I am not worried about offending people with the truth because I want to bring breakthrough drugs to market. One need only look at the patterns of research investment in this country to see that we systematically underinvest in vaccine research, contraceptive research, and many other key areas. The primary explanation for this phenomenon is an out of control product liability system that does not defer to regulatory determinations of product safety, does not use a "reasonable man" standard for liability, and does not weed out half-baked theories of causation.

You have a choice. You can change the system so that companies can evaluate the reasonable risks of product development or you can stick with the status quo. The cost of sticking with the status cuo in the pharmaceutical industry is human life—we need a climate that will encourage the development of AIDS vaccines, safer, more effective contraceptives; and new childhood vaccines that might save untold agony and cost.

It is your choice, and I urge you to choose the compassionate choice of supporting S. 687, a reasonable first step toward reform.

PREPARED STATEMENT OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS

Mr. Chairman, on behalf of its over 600,000 members, the National Federation of Independent Business welcomes the opportunity to present the views of small business on product liability. NFIB members are business owners who typically employ 8 employees. The median gross sales for NFIB members is around $250.000 annually. Our membership reflects the national business population of retail, service, manufacturing, farming and other business entities. We are the nation's largest small business advocacy organization.

Small business owners are hit particularly hard by the continuing increases in liability insurance premiums and by the decrease in availability of liability insurance coverage for certain types of business processes or needs. A recent NFIB survey that asked our members to rank the problems and priorities that face their businesses showed the cost and availability of liability insurance ranked fifth among 75 small business problems. Furthermore, the 1986 White House on Small Business included tort reform and product liability reform as its number one recommendation for change.

Because our current civil justice system encourages conflict, protracted litigation and the shifting of responsibility in the search for deep pockets, small business can be stifled by the ever increasing cost of liability insurance. Therefore, it is imperative that Congress enact uniform national reforms of our product liability tort system in a responsible and rational manner that meets the concerns of the business community while protecting the rights of consumers with legitimate claims to recover damages. That is why the NFIB supports S. 687, the Product Liability Fairness Act, as an important step toward balance and fairness.

The legislation contains several improvements to our current liability system. It creates a uniform, national liability system and overrides the current patchwork of separate state liability laws that strangle business, stifle innovation and destroy competitiveness. Further, it provides incentives to settle, and encourages the use of procedures, such as alternative dispute resolution, that reduce time and money spent on liability cases. The bill establishes time limitations to protect companies from stale litigation and unjust suits against products that are more than 25 years old and creates a uniform standard for punitive damages.

In addition, this bill abolishes joint and several liability for non-economic damages, such as pain and suffering, ensuring that a business cannot be held responsible for the full damages simply because it has the deepest pockets. A business will be liable for these damages only in proportion to its share of the responsibility for the harm.

Also important to small business, S. 687 maintains the right of subrogation with respect to workers' compensation claims.

These are just a few of the important changes passage of this bill will accomplish. Without passage, the current tangled web of 50 unique state liability laws will continue to inhibit commerce. In addition, skyrocketing costs of liability insurance to

American business will only further limit our ability to compete in the global marketplace.

Although our products are often superior in quality, they can cost many times more than other nations' similar goods because of the associated liability costs. This is crippling American business. Equally troublesome, American consumers end up paying inflated costs for merchandise which would be less expensive if the manufacturer did not have to guard against unwarranted lawsuits.

Of particular importance to this committee, product liability laws have stifled incentives to develop new generations of improved products. Simply put, the liability risk and cost is too great to overcome the benefits of innovation. In turn, this means fewer jobs for Americans.

Passage of product liability reform legislation will reduce costs for American businesses, thereby reducing the costs of products bought by consumers, without compromising the quality of these products or the protection consumers have against unsafe goods.

The National Federation of Independent Business urges members of this committee and all senators to support S. 687 and its balanced and reasonable approach toward improving this nation's product liability system. In turn, this will enhance our ability as a nation to compete in the global marketplace.

PREPARED STATEMENT OF ERNEST L. DAMAN, CHAIRMAN, AMERICAN ASSOCIATION OF ENGINEERING SOCIETIES

The Engineers' Public Policy Council of the American Association of Engineering Societies (AAES) is pleased to have the opportunity to submit for the record our views on the Product Liability Fairness Act (S. 687). We strongly believe that a uniform federal product liability statute should be adopted to complement state tort reform initiatives. AAES is a multi-disciplinary organization dedicated to coordinating the collective efforts of over 800,000 members to advance the knowledge, understanding and practice of engineering.

Products are the end result of engineering research, design, and development. Thus, engineers are exposed to a disproportionate burden of legal liability because they design, construct and operate the high quality, value-added products and processes our technological society demands. We recognize the responsibility of engineers to perform their work in a professional and ethical manner in order to minimize occasions where liability actions could result. We also believe that our nations's legal system should justly compensate injured parties. But a fair and careful balance must be struck between the rights of defendants and plaintiffs. We believe that the present system, on balance, does not efficiently deter unsafe products or compensate injured parties.

Excessive litigation and unpredictable jury awards have significantly increased liability insurance premiums and considerably added to the cost of doing business. This cost is ultimately passed on to consumers in the form of higher prices. Moreover, the present system discourages and often obstructs product innovation and commercialization because of costs associated with liability. The loss from product lines—some potentially life-saving—withdrawn from the market or simply never produced is significant. The federal government should seek to lift barriers to innovation and commercialization which create quality jobs.

We believe a federal product liability statute should:

- Establish uniform product liability standards.
- Emphasize negotiation over litigation and the swift resolution of disputes by encouraging expedited settlements and dispute avoidance techniques, and providing incentives to participate in a state and federally-approved voluntary alternative dispute isolution procedure such as arbitration or mediation. This would avoid and resolve many disputes and remove claims—some frivolous—from back-logged courts while reducing unnecessary delay, costs, and confusion. Under the present tort system, a victim must wait, on average, 2½ years for a verdict in a product liability claim.
- Hold each defendant in a case liable only for the amount of damages assessed to the particular defendant in direct proportion to such defendant's share of the responsibility. The present joint and several liability procedure maintains that a defendant involved with a product which ultimately causes injury could be held fully responsible for the entire judgment in a damage suit even if the defendant is only minimally at fault. This, in our view, is fundamentally unjust and adds unduly to the costs of litigation. It imposes an excessive burden by allowing a plaintiff to seek full recovery from a given defendant simply because he or she is most able to pay.

Mechanisms to assess the degree of responsibility for any one defendant should be encouraged.

- Protect a defendant from liability if harm results from a plaintiff's negligence in the misuse or alteration of a product, or using a product in a way that the manufacturer responsibly warned against. The tort system should hold everyone to a reasonable standard of care.
- Apply punitive damages only in cases where there is clear and convincing evidence that the defendant willfully and flagrantly disregarded public safety.
- Encourage the application of a fault-based (negligence) standard, rather than strict liability, to determine a defendant's liability in product liability cases. When strict liability is applied, the defendant's fault or conduct is irrelevant. A defendant should be allowed to show a product was designed or manufactured as safely as possible using scientific and engineering knowledge at the time the product was introduced into the market.
- Adopt a two-year statute of limitations for product liability tort actions, beginning when the claimant discovers or should reasonably have discovered the harm and its cause.

It is estimated that 87 percent of all U.S. companies can expect to be the lead defendant in a product liability case at least once. The Brookings Institution found that $100 billion is spent annually in legal costs and judgments in connection with product liability claims. A reliance on the tort liability system often overlooks the important role of market forces and government regulation in protecting consumers from unsafe products.

Excessive product liability litigation is clearly handicapping American products in interstate and international commerce. Revitalizing the strength of the American industrial base through the design and manufacture of quality products is imperative to boosting economic growth and creating high wage American jobs. We believe uniform product liability standards as outlined above should be adopted to enhance the competitiveness of American products.

PREPARED STATEMENT OF ROBERT N. SAYLER, CHAIR, SECTION OF LITIGATION, AMERICAN BAR ASSOCIATION

I appreciate the opportunity to present the views of the American Bar Association on broad federal product liability legislation. I am Robert N. Sayler, Chair of the ABA's Section of Litigation, and also Chair of the ABA Working Group on Case Management.

The ABA is committed to having a legal system in America that is effective and just, one that protects the rights of consumers and manufacturers, plaintiffs and defendants. We have worked extensively on projects aimed at improving our civil justice system and I will discuss one of our current initiatives to improve the civil justice system later in my statement. First, however, I will discuss some of our efforts relevant to our tort liability system.

For more than a decade, the ABA has extensively studied the tort liability system and its product liability laws. To accomplish this the ABA created three broadly-based entities to study: 1) the advisability of broad federal product liability laws; 2) proposals to improve the tort liability system; and 3) the liability insurance system.

The ABA has continuously opposed enactment of broad federal product liability legislation since February of 1981 when the ABA's policy-making body, the House of Delegates, adopted by voice vote a resolution opposing enactment of legislation which would impose a model products liability proposal as federal law.

The ABA opposes legislation such as S. 687, the "Product Liability Fairness Act" because we believe broad federal product liability legislation would deprive consumers of the sound guidance of the well-developed product liability laws of their individual states, as well as the flexibility to carefully refine the law through their state courts, and to make any necessary major improvements in the law through their state legislatures in furtherance of their economic or social needs.

The broadly-based entity charged by the ABA to study the advisability of broad federal product liability legislation was appointed by the ABA President in 1982. The committee was called the Special Committee to Study Product Liability. The Committee included among its members nominees of the Sections of Business Law, Public Contract Law, Litigation and Tort and Insurance Practice. Based on the recommendations and report of the Special Committee, in February, 1983, the ABA's House of Delegates adopted the resolution appended to this statement as Appendix A. Also appended to this statement as Appendix B is the report that our House of

Delegates considered when it adopted the 1983 resolution. It discusses in detail the rationale for the 1983 ABA policy.

The resolution opposes enactment of broad federal product liability legislation. It supports enactment of narrowly drawn federal legislation on victim compensation which addresses the issues of liability and damages with respect to claims arising out of occupational diseases (such as asbestosis) with long latency periods in cases where: 1) the number of such claims and the liability for such damages threaten the solvency of a significant number of manufacturers engaged in commerce; and 2) the number of such claims have become excessive burdens on the judicial system. It also supports federal legislation allocating product liability risks between the federal government and its contractors. The House of Delegates thus reaffirmed the wisdom of leaving the great majority of products liability case law to the various states which are in a position to best address themselves to the specific social and economic needs of their constituents.

The broadly-based entity charged by the ABA to study proposals to improve the tort liability system was appointed by the ABA President in 1985. The 14-member commission was called the Action Commission to Improve the Tort Liability System.

The members of the Commission were federal trial and appellate court judges; a state Supreme Court justice; corporate counsel, including those with insurance experience; consumer and civil rights advocates; academicians; and practicing plaintiffs and defense lawyers.

In February 1987, the ABA House of Delegates considered the Commission's recommendations and adopted the resolution appended to this statement as Appendix C.

The ABA takes the position that these recommendations to improve the tort system can and should be implemented by the courts and legislatures at the state, and not the federal level. This is in keeping with the ABA's view that the tradition of state-fashioned tort principles remains fundamentally sound.

The ABA resolution makes numerous recommendations addressed to the courts and to the lawyers. These recommendations include the following:

1. No ceilings should be placed on pain and suffering awards. Instead, trial and appellate courts should more effectively control pain and suffering verdicts which are either so excessive or so inadequate as to be disproportionate to the injury suffered or to community expectations.

2. Tort awards for pain and suffering should be more uniform. To achieve that goal, the ABA recommends such approaches as objective annual studies of tort awards, public information on those awards, guidelines for use by the trial courts, and study given as to whether additional guidance can and should be given to the jury on the range of appropriate damage awards.

3. Fee arrangements should be written in plain English or appropriate other language; percentage fees should be out of the net amount and not out of the gross amount of any judgment or settlement; and courts or a public body should disallow attorneys fees that are found to be plainly excessive.

4. To protect future claimants, the ABA opposes various forms of secrecy agreements and arrangements that require destruction of information or records as well as agreements that would prohibit a particular attorney from representing other claimants.

5. The ABA has specific recommendations addressed to the courts to streamline the litigation process, to eliminate frivolous claims and to reduce the long delays currently characteristic of much litigation. These include permitting non-unanimous jury verdicts and use of alternative dispute resolution methods.

There are certain areas in which the ABA believes state legislative action may be needed.

1. The ABA believes that punitive damages are appropriate in certain cases, but their scope should be limited. They should not be commonplace. The basic standard to establish punitive damages should be a conscious or deliberate disregard of a defendant's obligations. The standard of proof should be "clear and convincing" evidence and not a lesser standard such as a "preponderance of the evidence."

2. The ABA is concerned that no defendant should be subjected to punitive damages that are excessive in the aggregate for the same wrongful act. There should therefore be safeguards to prevent the imposition of repeated punitive damages. The purpose of punitive damages is to punish, not to confiscate. The ABA recognizes that the principal responsibility to control excessive awards for punitive damages rests on the courts; however, state legislation may be necessary to assure more effective judicial review of punitive damage awards.

3. The ABA believes that the doctrine of joint and several liability should be limited by legislation to apply only to economic losses in certain cases. Defendants should not be held liable for someone else's share of any non-economic loss when

the defendant's responsibility is substantially disproportionate to liability for the entire loss suffered by the plaintiff.

4. The ABA recognizes that allowing non-unanimous jury verdicts may require legislation.

A number of states enacted tort reform legislation over the past several years. Some of the legislation is quite far-ranging, other legislation fairly limited. We believe that state legislatures should continue to review and improve upon their tort systems.

The broadly-based entity charged by the ABA to study the liability insurance system, the ABA Commission to Improve the Liability Insurance System, was appointed by the ABA President in 1987 to report and make recommendations to our House of Delegates.

In response to the ABA Commission report, in February 1989 the American Bar Association's House of Delegates adopted a resolution aimed at improving the liability insurance system. That resolution is appended to this statement as Appendix D.

While much public attention has been focused on proposals to change the substantive rules of products law, we believe the greatest threat to manufacturers and consumers is the excessive costs and delays' in our civil justice system. Drug cases are bleeding resources from our civil justice system. Broken families, crime and other social problems have also had a significant impact on the courts. These issues have increased dramatically the workload on all parts of the justice system and strained the system beyond its capacity. The result is increased costs and delays for civil litigants. The system is simply becoming too slow, too costly and too inaccessible for most Americans.

The ABA believes that solutions to the problems facing our justice system will only be found by bringing together a broad variety of constituents to address the problem. I am intimately involved in an ABA initiative to do just this.

About a year ago the ABA established a Planning Group on Civil Justice Improvements. It is coordinating the efforts of three working groups developing consensus programs in the areas of discovery, case management and early settlement of cases. The Working Groups are comprised of representatives from more than forty organizations with an expressed interest in improving the civil justice system. These organizations represent the whole spectrum of our civil justice system including consumers and businesses, plaintiffs and defendants. I chair the Working Group on Case Management.

On December 13th and 14th, the ABA will host a Symposium to discuss the proposals that are being developed by the three Working Group entities, and ways to implement the proposals that the various organizations represented at the Symposium have agreed upon.

Following the Civil Justice Symposium, and a Symposium on Criminal Justice that the ABA is also sponsoring, the ABA will host a three-day national public conference in May 1994. This conference will examine the public's declining confidence and trust in the administration of the legal system. It will be modeled after citizens' conferences of the 1960's and more contemporary "futures" conferences held by the American Judicature Society in many states. The conference will engage lawyers, judges, academics and the public at large in open and frank discussions on the major issues affecting the justice system. The conference will assess what is being done and what can be done to improve the justice system and attempt to develop a consensus for a program of improvement.

Thank you for giving me this opportunity to submit the American Bar Association's views to you on this important subject.

[Appendixes A through D may be found in the committee's files.]

LETTER FROM MICHAEL J. SAKS, PH.D., M.S.L., PROFESSOR OF LAW, UNIVERSITY OF IOWA

OCTOBER 29, 1993.

Sen. ERNEST HOLLINGS,
U.S. Senate,
Washington, DC 20510–6125

DEAR SEN. HOLLINGS: My apologies for not responding sooner to your letter of October 1. I was in Europe for 10 days earlier in the month and on my return was greeted by an avalanche of paper.

First, your letter asked me to comment on a recent Rand report entitled "Product Liability and the Economics of Pharmaceuticals and Medical Devices."

I have not yet seen the report, but from discussions I have heard about it, I gather that it reports the findings of interviews with executives in the industries named in the report's title. Those executives give their perceptions, impressions, and attitudes toward products liability litigation, and what they say have been their responses to what they believe about the behavior of the liability system. If this is true, then it appears not to be a study about the actual performance and effects of the system, but what a sample of more or less well or poorly informed individuals believe about the system.

Numerous other studies show that a considerable gap often exists between what people believe about the tort litigation system and what the hard data show to be its actual state or functioning. For examples: the Harvard Medical Practice Study found in their survey of physicians that they overestimated by 15-30 times the likelihood that a negligently injured patient being a claim.[1] A survey of South Carolina lawyers, state legislators, and physicians found that in general they overestimated by a considerable margin the size and rate of growth of tort awards in the state.[2] These are but two examples of numerous beliefs and assertions about the tort system's behavior that turn out not to be consistent with the hard empirical evidence on filings, verdicts, and awards, their levels, their growth, and their predictability.[3]

Similarly, the Rand study about which you inquire may tell us more about the respondents—the accuracy of their beliefs, the depth of their fears, their averseness to risk, their strategic responding to surveys and interviews, etc.—than it tells us about the tort system. Perhaps we should all be pleased that a system that actually responds so infrequently and weakly is perceived as being so ferocious (thereby raising its deterrence level closer to where the law intended it to be). Or, if the distorted and exaggerated perceptions lead to over-deterring, the appropriate solution might be to provide the real data on the system to those making corporate decisions.

I might add that I have met with and spoken to executives from a number of large corporations, and they seemed to have little interest in the real data of the system's performance, and were simply fixated on insulating themselves from liability, however great or small the risk, however appropriate or inappropriate the balance between consumer interests and producer interests.

Second, you asked, since most persons who suffer product injuries do not sue, who ultimately bears the cost for those injuries, and what is the significance of that information to policy-makers?

With existing data we can achieve only an approximate sense of the costs imposed. That approximation comes from a massive national study, also by Rand researchers, of non-fatal accidental injuries.[4] In all, the direct and work-loss costs (from all non-fatal accidents in a recent year) in the United States came to $175.9 billion. Of that sum, $86.4 billion went for medical care, and most of the rest reflects work loss in various forms. About 38 percent of these direct costs are paid out of the pockets of the injured and their families. About two-thirds of the cost of the lost earnings were borne by the accident victims or their families. The study found that "[w]orkers' compensation pays the hospital bill for about 50 percent of individuals injured during work time." Most other direct costs are paid by first party insurance or by taxpayers through various forms of social insurance.

"The income loss borne by individuals and families amounts to $51 billion annually." Not surprisingly, given that better paying jobs are more likely to provide disability benefits, the less a person earns, the larger a proportion of his or her earnings go unreimbursed. Those earning $50,000 or more per year had to absorb only 37 percent of the cost of their lost earnings, those earning $25-50,000 lost 65 percent of their earnings, and those earning under $25,000 had 80 percent of their losses go unreimbursed.

Where is the tort system in all this? Liability payments paid the hospital costs of three percent of hospitalized patients and five percent of those receiving outpatient care. The tort liability system compensated only $7.7 billion of the total $175.9 billion of direct personal losses due to accidental injuries.

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[1] Harvard Medical Practice Study: Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York: The Report of the Harvard Medical Practice Study to the State of New York. Boston, MA: Harvard School of Public Health (1990); Weiler, Paul C. et al., A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation (Harvard University Press, 1993).

[2] F. Patrick Hubbard, "Patterns" in Civil Jury Verdicts in the State Circuit Courts of South Carolina: 1976-1985, 38 S.C. L. Rev. 699 (1987); Donald R. Songer, Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts, 39 S.C. L. Rev. 585 (1988).

[3] Saks, MJ. Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?, 140 Pennsylvania Law Review 1147 (1992).

[4] Hensler et al., Compensation for Accidental Injuries in the United States (Rand, 1991).

Since this study, unlike the Harvard study of medical malpractice, did not try to separate accidents into tortious and non-tortious, we cannot know what proportion of the costs of accidents ought to have been paid by the tortfeasers. But by any imaginable guestimation of the proportion of accidents that are due to actionable conduct by an injurer, the proportion compensated through the tort system would remain remarkably small.

In all, 95.6 percent of the losses resulting from these accidents were paid by the accident victims out of pocket or through the victims' first party insurance, or by the taxpayers.

What is the policy implication of these findings? At a minimum, it is that most of the pressure to reform the tort system, including the product liability portion of the system, is pushing it in the direction of making its greatest failing somewhat worse. The system rarely compensates the victims of injury; the thrust of reforms is to compensate even fewer. What the Harvard Medical Practice Study concluded about the malpractice system could be said as well for products liability: victims of serious accidents who, under the law, should be receiving compensation to receive it. The problem is not that insurers and manufacturers are unfairly burdened by liability claims, but that the victims of injury find it so difficult and time-consuming to receive the compensation that is due them under the law.

An understandable legislative response to the facts of the tort system might be to abolish the tort system and replace it with a no-fault system. Or it might be to take steps to make the present tort system work as it is supposed to so that the victims of tortious injury receive reasonable compensation and injurers are deterred at the socially desirable level. But it is hard to fathom, in light of the data, why anyone would want to restrict access or compensation further than the existing system already does.

Sincerely,

MICHAEL J. SAKS, Ph.D., M.S.L.,
Professor of Law.

QUESTIONS ASKED BY SENATOR HOLLINGS AND ANSWERS THERETO BY MS. GILBERT

Question. During your testimony, you stated that sealed documents (secrecy) in settlement cases is an obstacle to obtaining the necessary information for assessing the functions of the product liability system. Could you explain your position on this matter in more detail?

Answer. For over ten years, major U.S. manufacturers have asked the Congress to enact legislation that would make it more difficult for people injured by defective products to receive full compensation from the manufacturers through the court system. S. 687 is the latest version of the legislation they have supported.

Supporters of S. 687 and its predecessors make a number of claims about the product liability system to show that the legislation is necessary, including: too many unfounded lawsuits are filed; too many unfounded payments are made, either by misguided juries or through settlements; under joint and several liability, innocent "deep pockets" are forced to make payments to plaintiffs; and the threat of punitive damages increases settlements, even where no outrageous misconduct has occurred. However, manufacturers and their insurers have refused to submit data to support these claims, and because of courtroom secrecy, we have been unable to independently investigate these claims.

Most product liability lawsuits are settled, and in most cases, the settlements are accompanied by a secrecy order that keeps the settlement amount and information uncovered through discovery sealed from the public. This makes it virtually impossible to study the product liability system to assess the claims being made by manufacturers. For example, we know that the doctrine of joint and several liability is not a factor in most lawsuits that proceed all the way to a jury verdict. However, supporters of S. 687 claim that joint and several has a big effect on settlements, coercing defendants who are not responsible for an injury to pay the entire damage amount. We have no way to investigate this claim because of secrecy agreements that keep the details of product liability cases from the public.

We support legislation that would restrict the ability of parties in product liability lawsuits to obtain secrecy orders over settlements and discovery information. By opening up the information to the public, we could find out about dangerous products and corporate practices much sooner than we do now, and the entire system would be made more efficient because litigants would not have to reinvent the wheel in lawsuits over similar products or practices. Another important benefit to restricting secrecy agreements is that we would learn a great deal more about the product liability system itself.

Question. As you may know, Steve Garber of the Rand Institute recently issued a report entitled "Product Liability and the Economics of Pharmaceuticals and Medical Devices." In his conclusion, Mr. Garber provides several policy options for addressing concerns regarding the impact of product liability on the pharmaceutical and medical device industries. Among his suggested policy options is a recommendation that pharmaceutical companies and manufacturers of medical devices be shielded from liability if they comply with FDA regulations. a. Based on your experience and research, what is your view of this proposed policy? b. What is your opinion of the overall study and how does it comport with your own research and other available data with which you are familiar?

Answer. (a) We do not support giving manufacturers of drugs and medical devices a shield from liability if they comply with FDA regulations. The reason for our opposition is contained in the written testimony I submitted on September 23. I am also attaching a report we issued along with three other national consumer organizations that explains in more detail why we vehemently oppose using government regulation as a defense to liability.

[The report referred to may be found in the committee's files.]

(b) I have not read the Rand study myself, but I have read materials that have been written about the study. Based on that information, here are my comments:

(i) The goal of the policy recommendations in the Rand study is economic efficiency, not maximum safety. In contrast, we approach the issue of product liability from a consumer protection perspective, not an economic one.

(ii) As I understand it, the Rand study supports using compliance with FDA regulations as a defense to liability only if the following conditions are met:

- The defense to liability for regulatory compliance must be coupled with a finding that the defendant is liable whenever there has been non-compliance. According to the study, compliance requires "providing all required information in an accurate and timely fashion."
- The regulatory compliance defense is only appropriate for drugs and "extensively regulated medical devices," in recognition of the fact that some medical devices are not very well-regulated.
- The practice of obtaining secrecy orders in product liability lawsuits should be limited (see response to previous question). The study states that a regulatory compliance rule could be substantially weakened if evidence of noncompliance discovered by plaintiffs in product liability suits is kept secret. As examples of the damage done to public safety by protective orders, the study cites the Bjork-Shiley heart valve, silicone-gel breast implants and the drug Halcion.
- The Rand study suggests considering the use of criminal sanctions in cases of egregious behavior, because of "the difficulties of efficiently targeting the incentive effects of punitive damages."

Therefore, the Rand study cannot be accurately cited in support of a regulatory compliance defense to liability for drugs and medical devices with FDA approval. Rather, the study supports such a defense only with substantial changes to both the regulatory and legal systems, including an imposition of liability whenever there has not been regulatory compliance.

PREPARED STATEMENT OF ANDREW F. POPPER, PROFESSOR OF LAW AND DEPUTY DEAN, WASHINGTON COLLEGE OF LAW, THE AMERICAN UNIVERSITY

My name is Andrew F. Popper. I am a professor of law and the academic dean of The American University Washington College of Law. I have been teaching torts and product liability law for the last seventeen years. I have been a tenured full professor of law since 1983. In the last twelve years I have had the opportunity to testify or comment on many of the "tort reform" measures that have been proposed to the Congress and at the state level.

EXECUTIVE SUMMARY

Some years ago on a hot summer night an infant put to bed for the evening in his crib wriggled in his sleep until his feet stuck between two slats of his crib. He twisted and wiggled further, and his abdomen and chest also slid through those two slats. The final wiggle, and his shoulders moved through the same area, but his head was larger than the opening; the next morning his parents found him hanging—dead from his crib.

Turn on your LEXIS machines and check the case law, and you will not find this case.[1] When U.S.C.P.S.C. Commissioner David Pittle told of this tragic circumstance and others like it, he was describing a situation where plaintiffs had been unsuccessful in pursuing tort claims and had come for help to the agency for which he then worked, the Consumer Product Safety Commission. A plaintiff-oriented tort system "out of control" would have awarded damages in this setting if sympathy had replaced logic. No damages, however, were forthcoming.

The parents who walked into the bedroom of the infant hanging from his crib are without a remedy in tort; that is, however, the way the system works, and it is a system that works well. To come before this Committee and assert that there is a crisis in the system, that juries are unduly plaintiff-oriented, that insurance companies are suffering crises in a period in which their annual profits are reported in the tens of billions of dollars,[2] and to ask for legislation that would reduce further the rights of consumers is offensive.

There are a number of questions this Committee must ask as it looks at this bill and reviews the product liability field.

(1) Is there a crisis in the tort system of a proportion sufficient to justify this extraordinary intrusion into state tort law?

(2) Does the tort system affect adversely domestic businesses in international markets, requiring federal intervention?

(3) If this legislation is passed, who would benefit from the following:

- The nonapplicability of strict liability in tort to sellers;
- The elimination of implied warranties by sellers;
- The creation of a standard for punitive damages more difficult than in criminal cases;
- Revitalizing and expanding the "government standards" defense;
- The abolition of joint and several liability for noneconomic loss, including pain and suffering;
- The imposition of a national statute of repose;
- The severe restrictions placed upon plaintiffs and the elimination of the collateral source rule in the workers' compensation offset provisions;
- The imposition of the 50/50 comparative fault doctrine in certain cases; or
- The expedited judgment provisions?

My guess is you know already the answers to these questions. There is no extraordinary crisis that would justify the disassembly of state law inherent in this bill. There most assuredly is no empirical evidence or even convincing anecdotal evidence to suggest that U.S. firms have ceased to be competitive in international markets because of an oppressive product liability system.

As to who would benefit from the passage of this legislation, the answer is obvious. Manufacturers, product sellers, wholesalers, and insurance entities are the sole beneficiaries of this legislation. Consumers, and particularly those who are victims of defective products, gain nothing from this bill.

Although the bill is watered down from prior efforts to undermine federally the state tort system, it produces a classical "camel's nose." Bring this bill to the floor of the House, and amendments will be put forward, probably before the first serious vote is taken, to provide more benefits to manufacturers. Pass this bill, and in future quiet sessions attracting nowhere near this level of attention, the federalization of tort law and the disassembly of consumer protection will become an annual function of this and other committees in our Congress.

S. 687 is a crude intrusion on the rights of the states to implement their tort systems. Few components of our legal system are as much a part of traditional state court jurisdiction as tort law. Even punitive damages "have long been a part of traditional state tort law." Silkwood v. Kerr McGee Corp., 464 U.S. 238, 255 (1984).

The tort system works effectively, although not perfectly; whatever problems exist are certainly not at a level sufficient to justify federal intervention. There is no clear evidence of a failure in the system; in fact, the tort system produces substantial consumer benefits with a minimum of transaction costs. S. 687 would undermine the tort system and eviscerate consumer benefits. It should not become law.

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[1] What you will find in your legal research is *Odom* v. *Welch*, Ohio Court of Appeals, LEXIS 4546, November 10, 1988, in which an infant died when its head was caught in the sliding portion of a headboard of a crib. In *Odom*, the jury found that the injury was the fault of the parents who had misassembled the product, and the court of appeals affirmed the decision of the jury.

[2] Hearing on Product Liability Before the Consumer Subcommittee, 99th Cong., 2d Sess. (1986), statement of Johnny C. Finch, Senior Associate Director, General Government Division, General Accounting Office, in which Mr. Finch testified that in a prior ten-year period (1976-1986) the net gains made by the insurance industry were between $52 and $79 billion.

THERE IS NO TORT CRISIS SUFFICIENT TO JUSTIFY INTERVENTION BY THE CONGRESS INTO MATTERS HISTORICALLY VESTED TO THE STATES

During the period from 1950 to 1965 (the "negligence" period of product liability law), there were relatively few product liability cases. Section 402(a) of the Second Restatement had not yet been adopted, and consumer expectations regarding the utility of tort litigation were very low. In part, this was due to a fairly conscious campaign on the part of advertisers to convince consumers that most product related accidents were in fact the fault of consumers.

One famous advertisement of this nature was the "Willie Tinker" commercial, in which a small cartoon figure suggested to consumers that if only they would be more careful, fewer accidents would occur. In this time period, social expectations regarding the legitimacy of corporate decision-making were high; a certain trust was placed in our corporate system which allowed for the promulgation of a paternalistic order. Corporations were to be believed because they were good for America.

From 1965 forward, the game changed. First, the legal tools for product liability law changed immeasurably with the gradual adoption of §402(a) by various states. Second, the era of trust in corporate America came to a crashing halt with the end of the decade of the sixties. Consumer information demands increased, and the use of tort litigation correspondingly increased, permitting people to use the court system to accomplish proper objectives of consumer protection, rather than corporate protection.

The tension in the product liability area between 1970 and today is the result of these changes. It has taken twenty years to understand and implement §402(a). Such changes are now being realized in a small number of highly legitimate cases (see Appendix A), and it is no secret that the manufacturing and insurance communities would rather turn back the clock.

Approximately twelve years ago, those seeking fundamental change in the tort system latched on to the phrase "tort reform" to describe legislative and judicial initiatives designed to minimize the potential liability of insurers and manufacturers. The selection of the term "tort reform" reflects true genius in terms of public relations; it provides a positive and populist image to a profoundly pro-corporate and anti-consumer initiative.

The tort reformers have an agenda. It has been developed carefully over the last twelve years. The tort reformers seek to reduce the potential of injured persons to succeed in personal injury cases, limit the amount of money negligent manufacturers are obligated to pay for the harm caused by their products, reduce the risk faced by insurance companies so that they can compound their already obscene profits, and limit the exposure to punitive damages for manufacturers or others who have engaged in intentional or grotesque misconduct.

The agenda has played out in the form of proposals for federal and state legislation, in the form of support for defendants in product liability cases, in the form of financing the production of skillfully written amicus briefs in the Supreme Court, and in the form of underwriting the cost of public relations and advertising.

The advertising sponsored by the tort reformers is designed to convince the American public that the agenda for tort reform serves the consumer. The goal of the advertising, the lobbying, and the scholarship of tort reform is to create an image of the tort system in which plaintiffs are lucky winners of a bizarre lottery and on a regular basis walk away from courthouses with millions in their pockets and smiles on their faces. This unjust enrichment, so goes the advertisement, can only be stopped if state legislators, members of Congress, judges and juries all become convinced of the "fraud" being perpetrated by plaintiffs and their lawyers.

Rather than portraying people injured by defective products as victims of a manufacturer's negligence or gross misconduct, the tort reformers portray victims as successful con artists. People whose lives have been destroyed, whose families have been devastated, whose intelligence has been robbed from them by horrifying injury, or whose bodies have been deformed or burned by defective products are characterized in the advertising campaign of tort reform as lucky winners.

Of the many millions of consumers injured by products each year, only a tiny number succeed in product liability actions. For the few who seek legal redress, there are numerous hurdles.[3] Nonetheless, a perception has been fostered that there are endless numbers of outrageous cases won by consumers.

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[3] "Contrary to popular belief, most injured Americans do not attempt to collect compensation from someone else connected with the accident." Product Liability: Hearings on S. 640 Before the Subcomm. on Consumer of the Senate Comm. on Commerce, Science. and Transportation, 102d Cong., 1st Sess. 65 (1991) (statement of Deborah R. Hensler, senior social scientist at the Institute for Civil Justice of the RAND Corporation).

Arguments about tort reform often begin with industry representatives coming to committees like this to tell you, almost tongue-in-cheek, about these "wacky" cases. For example, I am sure that you have all been told of the psychic who won a multi-million dollar verdict after she claimed that a CAT-scan had destroyed her psychic powers. That verdict was thrown out as being grossly excessive by an appellate judge.

Along similar lines, we hear on a regular basis of a helmet manufacturer who was sued for $10 million after a motorcycle crash. It is a good story; however, what is usually left out of the anecdote is that the child who was horribly injured in this incident lost the lawsuit.

It is my position that there is a need for legislation, although it is not based on the misfortunes of the insurance or manufacturing community in the United States. Instead, it is based on the simple need for health and safety that is threatened by unsafe products, unsafe drugs, unsafe toys, unsafe food, unsafe chemicals, and on and on. Indeed, I favor state consideration of criminal sanctions in product liability cases. See, e.a., Illinois v. Film Recovery Systems, Doc. No. 83-11091 and Doc. No. 84-5064, Cir. Ct. of Cook Co., June 14, 1985.

What I do not favor is a defense-oriented federal bill that is presented to this Committee as a solution to the tort crisis. The "tort crisis" predicate for S. 687 cannot possibly be based on product liability cases in which compensatory damages are paid for several reasons. First, S. 687 does not address compensatory damages in a significant way and, therefore, it seems unlikely that the authors were possessed of the belief that there was a "crisis" in that domain. Second, compensatory damages perform the classical function of restoring injured persons, a function that is supported by most of the participants on both sides of the tort reform debate. Third, there is no credible empirical study of compensatory damages that suggests a "crisis."

The report of the United States General Accounting Office, "Product Liability: Verdicts and Case Resolution in Five States," GAO/HRD-89-99 (Sept. 18, 1989), and a GAO report of the prior year, "Product Liability: Extent of 'Litigation Explosion' in Federal Courts Questioned," GAO/HRD-88-36BR (January 1988), conclude that there is no explosion in the product liability litigation field, and certainly nothing relating to compensatory damages. An identical conclusion is reached by Professors Henderson and Eisenberg in "The Quiet Revolution in Product Liability: An Empirical Study of Legal Change," 37 U.C.L.A. L. Rev. 479, 480 (1990). The Henderson and Eisenberg conclusion is also supported in the various RAND Corporation studies such as Dung-worth, "Product Liability and the Business Sector: Litigation Trends in Federal Courts," RAND Corporation, Institute for Civil Justice, R-3668-ICJ (1988). To the extent that there is "growth" in product liability litigation, it is concentrated in a few products and primarily in asbestos, where there has been a substantial increase in the number of compensatory damage awards.[4]

In light of the above, it is thus evident that the empirical basis for the challenge to the tort system is predicated on the assumption that there are massive punitive damage awards. The nature of punitive damages creates the possibility that liability can be imposed to punish and deter a corporation engaged in gross misconduct at a level that could cripple the corporation. Fears of such "excess" liability have prompted four Supreme Court cases, *Crenshaw* v. *Bankers Life,* 486 U.S. 71 (1988), *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.,* 492 U.S. 257 (1989), *Pacific Mutual Life Ins.* v. *Haslip,* 111 S. Ct. 1032 (1991), and *TXO Production Corp.* v. *Alliance Resources Corp.,* 113 S. Ct. 2711 (1993). In these cases manufacturers, insurers, and a large oil and gas production company sought to use the Supreme Court to attack punitive damages. In Crenshaw and Browning-Ferris the attack was based on the

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According to a 1988 RAND Corporation study, there are "roughly 9½ million product-associated injuries per year, not including motor vehicle accidents," or injuries which resulted in fatalities. The overall "claiming rate" for these injuries is less than 5 percent where a "claiming activity" includes action ranging from "talking directly with the perceived injurer, to seeking legal representation, to filing a lawsuit." Id., citing D. Hensler, "Compensation for Accidental Injuries in the United States," (RAND Institute for Civil Justice, 1990).

[4] Reports of the gruesome suppression of consumer safety information regarding asbestos hazards are now available. They reveal that in 1934 the Johns-Manville Corporation was given specific information that "asbestos products inhaled into the lung produce an exceedingly severe and perhaps fatal inflammation. This condition [is] called "asbestosis." Asbestos Litigation Reporter, Andrews, 3, February 7, 1979. When that information was assimilated by Johns-Manville, it asked one Dr. Landza to report the "favorable aspects of 'the study,' and to suppress the unfavorable ones." It took fifty years of litigation to pin down the correspondence, but once the letters were revealed the probability of extensive product liability litigation became a reality.

Outside of the shameful behavior of the manufacturers of asbestos, one is hard pressed to find an industry-wide setting where compensatory damage awards are challenged.

Excessive Fines Clause of the Eighth Amendment; in Haslip and TXO the attack was based on the Due Process Clause of the Fourteenth Amendment.

S. 687, like S. 44 (the first serious product liability bill proposed before the Congress in 1984), is a bill designed to make it more difficult to receive punitive damages. It would change culpability and burden of proof standards for punitive damages in a number of states. It prevents the imposition of any punitive damages in certain aviation and pharmaceutical cases and, like its predecessors, reflects a concern that punitive damages are excessive and not proportional to the wrongdoing of defendants.[5]

Although there is a growing body of literature in the field of punitive damages, the assessment is not complete nor is a clear conclusion emerging. A recent comprehensive study funded by the American Bar Foundation concludes that there is no punitive damage crisis based on an evaluation of 25,627 jury verdicts and related statistics. Daniels & Martin, Myth and Reality in Punitive Damages, ABF Working Paper 8911 Am. B. Found. Res. J. 63 (1990) [Daniels & Martin 1990].[6] The overall data show that punitive damages were awarded in only 8.8 percent of the successful cases. Product Liability: Hearings on S. 640 Before the Subcomm. on Consumer of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong., 1st Sess. 77, 83-85 (1991) (statement of Dr. Stephen Daniels, Senior Research Fellow, American Bar Foundation). Moreover, of these 25,627 cases, only 967 (3.8 percent) were product liability cases, of these only 39.2 percent (379) were successful, and punitive damages were awarded in only 8.9 percent (34) of these successful product liability cases. Id. at 77, 83-85, 87. Another study revealed only 355 punitive damage verdicts in product liability cases in state and federal courts over a 25 year period. Product Liability: Hearings on 5.640 Before the Subcomm. on Consumer of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong., 1st Sess. 144 (1991) (statement of Michael Rustad, Professor of Law at Suffolk University Law School). A 1986 study of over thirty jurisdictions in ten states from 1981 to 1985 asserts that punitive damages were not routinely awarded. Daniels, Punitive Damaes: Storm on the Horizon?, Preliminary Report of the Punitive Damages Project Study, Am. B. Found. Fellows Seminar, ABA Midyear Meeting, Baltimore, Md. (February 8, 1986) [Daniels 1986].

The Daniels 1986 study found that punitive damage awards in cases where plaintiff won a money judgment ranged from 0.0 percent of all reported verdicts in four sites to a high of 21.6 percent in one site. For two-thirds of the surveyed sites, the percentage of reported verdicts in which plaintiffs won money was less than ten percent. In New York City, only 1.6 percent of awards included punitive damages, 2.2 percent in Cook County, Illinois (which includes Chicago), and 8.6 percent in Los Angeles County, California. Daniels 1986 at 11. The Landes & Posner study, sura, note 6, of federal courts from 1982 to November of 1984 found four punitive damage awards upheld out of 172 cases, and of 359 product liability cases, punitive damages were allowed in only two percent. A RAND study of civil jury trials in San Francisco, California, and Cook County, Illinois, between 1960 and 1984 found only eight awards of punitive damages in product liability cases. Peterson, Punitive Damages: Preliminary Findings (RAND Institute for Civil Justice 1985).

Critics of the tort system and punitive damage awards distort statistical images through the use of numerical averages. For example, in the RAND Cook County study, the average award was $137,350, but 87.7 percent of the cases had awards lower than the average, with a median of $8,800. Medians are the appropriate measure since they reflect the typical award or the dollar amount for the case at the 50th percentile when awards are listed from lowest to highest in ascending order. Daniels & Martin 1990 at 42-43; Daniels 1986 at 13. The fact is that "[t]he predicted unmanageability of punitive damages has failed to appear. Experience has shown that judicial oversight of punitive damages awards has greatly reduced the risk of substantial over-deterrence."[7] Reisberg, In Defense of Punitive Damages, 55

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[5] The argument that punitive damages are "out of control" has already been made in the Supreme Court. *Browning-Ferris*, 109 S. Ct. at 2923 (Brennan, J., concurring), and *Bankers Life*, 436 U.S. at 87-88 (O'Connor, J., concurring).

[6] The Daniels & Martin study has also been published at 75 Minn. L. Rev. 1 (1990). A diverse group of scholars have written that whatever problems exist in the tort field, punitive damages play no substantial role. Landes & Posner, New Light on Punitive Damages, 10 Reg. 33 (Sept./Oct. 1986); Burrow & Collins, Insurance Crisis—Texas Style: The Case for Insurance Reform, 18 St. Mary's L.J. 759, 763-65 (1987); Kindregan & Schwartz, The Assault on the Captive Consumer: Emasculating the Common Law of Torts in the Name of Tort Reform, 18 St. Mary's L.J. 673, 695 (1987).

[7] "Appellate courts frequently reversed or reduced punitive damage awards. Dollar amounts for cases that ultimately resolved on appeal are a very small percentage of what was awarded at trial. These empirical findings cast doubt upon the assumption of whether punitive damages

N.Y.U. L. Rev. 303, 345 (1980). There are two empirical and systematic studies of punitive damages, and neither supports the proposition that there is a national crisis in punitive damages.[8] An exhaustive study confirming this conclusion was published in a 1991 Roscoe Pound Foundation monograph, "Demystifying Punitive Damages in Product Liability Cases: A Survey of a Quarter Century of Trial Verdicts," by Professor Michael Rustad of Suffolk University Law School.

This Committee must avoid scrupulously the mischaracterizations that have been put forward regarding the state of punitive damages.

> Horror stories and their implications are presented as if they are representative of what is typical, describing a system run amuck and in need of fundamental and immediate change. Such vivid stories typically distort the actual facts of situations described. * * * The stories are meant to foster the acceptance of a particular characterization of the civil justice system and punitive damages. * * * The view is portrayal as one so obvious and common-sensical that no reasonable person could disagree. * * *

Daniels & Martin 1990 at 22. Press kits and news releases have become the tools of jurisprudential debate, rather than case analysis and synthesis of jury verdict statistics. Daniels & Martin 1990 at 24. However, an analysis of the hard data put forward in support of tort reform and modification of punitive damages provides "little if any, reliable evidence on the punitive damage system." Daniels & Martin 1990 at 29.

> In general, then, it does not appear from our data that punitive damages are routinely awarded in the sites studied, contrary to what would be expected in light of the rhetoric of crisis and reform. Nor were punitive damages typically given in amounts that would "boggle the mind." Punitive damages were awarded infrequently, and when they were awarded the amount was typically modest.

Daniels & Martin 1990 at 44.

In the absence of unequivocal data suggesting a crisis in the punitive damage area, congressional intervention through S. 687 cannot be justified.

CONTRARY TO THE ASSERTIONS OF THE PROPONENTS OF S. 687, THE TORT SYSTEM GENERALLY AND PUNITIVE DAMAGES SPECIALLY DO NOT IMPEDE THE CAPACITY OF U.S. BUSINESSES TO COMPETE IN WORLD MARKETS

Recently, it has been contended that the tort system and particularly punitive damages have an adverse effect on the competitive posture of the United States. There is no solid empirical basis to support the proposition.

It seems incredible to assert that a system that condemns products or services produced fraudulently, in a grossly negligent manner, or in a way that comports with intentional misconduct is destructive of the competitive posture of the United states. In *Man* v. *Raymark Indus.*, 728 F. Supp. 1461 (D. Haw. 1989), the court considered whether punitive damages have a detrimental effect and prevent manufacturers from developing new products due to their fear of "uncertain liability."

> This court respectfully suggests that if that is indeed what is happening [to proposed new products], then punitive damages are accomplishing a worthy goal. In this respect it is important to remember that punitive damages are awarded for some form of outrageous misconduct, never for simple negligence. A manufacturer who vigilantly and honestly tests his product can have no fear of punitive damages.

728 F. Supp. at 146 n.7.

A companion attack is that the tort system diverts substantial resources away from research and development. This argument borders on the absurd for two reasons. First, there is only a minuscule level of direct or real dollar loss from punitive damages. Landes & Posner, supra, note 6; Daniels & Martin 1990 at 33-35. Second, the vast majority of punitive damage awards do not involve consumer goods such as pharmaceutical products; rather, they involve personal violence, false arrest, malicious behavior, or intentional misconduct. Daniels & Martin 1990 at 48, 50, and

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in products cases need reform." Product Liability: Hearings on S. 640 Before the Subcomm. on Consumer of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong., 1st Sess. 145 (1991) (statement of Michael Rustad, Professor of Law at Suffolk University Law School).

[8] Daniels & Martin 1990 and Peterson, Sarma & Shanley, Punitive Damages: Empirical Findings (RAND Institute for Civil Justice 1987). Prentice, Reforming Punitive Damages: The Judicial Bargaining Concept, 7 Rev. Litig. 113, 123 (1988) ("The attack on punitive damages is part of a wide-ranging, well organized attack on the current tort system. * * * There is substantial evidence that the claims of runaway punitive damages are greatly exaggerated.").

56.[9] It seems most unlikely that the problems of domestic manufacturers in international competitive markets stem from punitive damage awards that deter fraud or punish intentional wrongdoers.

Remarkably, with all the concern about "competitiveness," S. 687 does the one thing that suppresses innovation: it creates a defense of conformity with standardized systems in the pharmaceutical field. Our government should resist efforts to lock in place technology merely because manufacturers want to be shielded from punitive tort liability. This bill would declare as a matter of law that conformity with outdated standards guarantees that a pharmaceutical manufacturer will not be subject to punitive damages. From a competition perspective, such declarations are radically adverse to the best interests of consumers.

A recent study of the Office of Technology Assessment on competitiveness of American manufacturers evaluated four factors to be considered to improve the posture of American businesses in international markets. Notably, modification of product liability law, the law pertaining to punitive damages, the law pertaining to joint and several liability, or any other matter within S. 687 was not within that recommendation. United States Congress, Office of Technology Assessment, "Making Things Better: Competing in Manufacturing," OTA-ITE-443 (Washington, D.C., February 1990). The findings of the OTA report regarding competitiveness problems are also reflected in a report generated by the private sector which concludes that the cost of product liability in the United States is reflected in the cost of goods and services at a level of one to three percent. Webber, "Product Liability: The Corporate Response," The Conference Board, Report No. 893 (1987) 2. Studies by the RAND Corporation support this proposition, indicating that, first, less than one percent of all manufacturing concerns in the United States have any involvement in product liability litigation and, second, that about one percent of sales revenue is absorbed by product liability costs. RAND Corporation, "Designing Safer Products: Corporate Responses to Product Liability Law and Regulation" (Institute for Civil Justice, 1983) 121.

Although it may be tempting to pin on product liability the responsibility for the apparent lack of competitiveness of American producers in international markets, the evidence is simply not there. There is no market for defective products. Certainly, there is no market for products made in a manner that is grossly negligent. There is no evidence to suggest a dollar drain of such proportion as to offset critical research.

In short, this Committee must not rely on the assertion that the product liability system has affected adversely the competitiveness of American business. This is especially the case when such assertions are not supported by empirical data and are the result of the misinformation and propaganda of "reformers." Even industry representatives and leaders, like the general public, can be mislead by the tort reform campaign. If a decision is made to move forward, interfering in the activities traditionally vested to the states, some other basis is required.

THE ABSENCE OF A CRISIS SUFFICIENT TO JUSTIFY LEGISLATIVE INTRUSION INTO THE TRADITIONAL ACTIVITIES OF THE STATES SUGGESTS THAT S. 687 VIOLATES THE BASIC SPIRIT AND PRINCIPLE UNDERLYING FEDERALISM

S. 687 applies to "any civil action brought against a manufacturer or product seller, on any theory, for harm caused by a product," and excludes from coverage civil actions brought against a manufacturer or product seller for loss or damage to the product itself, or for commercial loss. Such excluded civil actions are to be governed by applicable commercial or contract law. S. 687, 103d Cong., 1st Sess. §4(a) (1993).

Under the general rule regarding the scope of preemption, S. 687 would supersede state law only to the extent that an issue is covered by it and state law. Where an issue is not governed by S. 687, that issue shall be governed by applicable state or federal law. S. 687, supra, §4(b)(1).

S. 687 enumerates seven areas of law which are not to be affected in any way by the provisions of either bill. Significantly, S. 687 is not to be construed to supersede or affect any federal law, except the Federal Employees Compensation Act and the Longshoremen's and Harborworker's Compensation Act. S. 687, supra, §4(c)(2).

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[9] Of the 25,627 cases evaluated by Daniels and Martin, only 3.8 percent (967) were product liability cases; of these 967, only 39.2 percent (379) were successful; and of these successful cases, punitive damages were awarded in only 8.9 percent (34). Overall, punitive damages were awarded in only 8.8 percent of the successful verdicts. Product Liability: Hearings on S. 640 Before the Subcomm. on Consumer of the Senate Comm. on Commerce, Science. and Transportation, 102d Cong., 1st Sess. 77, 83-87 (1991) (statement of Dr. Stephen Daniels, Senior Research Fellow, American Bar Foundation).

S. 687 eliminates large blocks of state law and substitutes in its place federal law. Preemption of this type is not uncommon, as is easily demonstrated in the fields of nuclear power, other forms of energy regulation, environmental regulation, and commercial or economic regulation. However, instead of preempting state law because of a pervasive federal need which ordinarily requires the creation of a regulatory agency or the vesting of jurisdiction in the federal courts, S. 687 simply wipes out state law and inserts the preferences of the drafters in its place.

The law created by S. 687 abolishes the judgments of state courts. It will turn on its head legislation passed by state legislatures. Generally speaking, such preemption is justified only if there are "pervasive reasons * * * either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 139, 142 (1963). In some ways it is difficult to imagine a "regulatory" problem of such a powerful nature that it would justify the abolition of state law and require the imposition of congressional mandates on the states without attendant federal jurisdiction.

Unlike initiatives in the air or water quality area which establish minimum standards to be applied by the states, and which are supported by a significant federal bureaucracy, this legislation establishes only the standards for states to apply. This is legislative self-righteousness of the highest order. The policy preferences reflected in S. 687 are in no way wiser, more just, or equitable than the policy preferences underlying the laws adopted in the various states. In some ways, S. 687 looks a good deal like state legislation where the state has exercised all of its policy preference options in favor of defendants or like the end product of one state's tort reform effort. (See Appendix B for examples of state tort reform legislation.) It is nothing more than that and is thus a document appropriate for consideration by the states, not by the United States Senate.

Since the evidence regarding the existence of a tort crisis is not there, and since it is fairly evident the tort system has provided substantial benefits for consumers, we are left with a rather hollow claim that the destruction of federal/state relations inherent in S. 687 is predicated on the national desire to establish a uniform tort system. First, the very nature of the United States suggests that uniform state law is not a dominant federal objective. (See, e.g., *Gertz* v. *Robert Welch Inc.,* 418 U.S. 323 (1974), regarding the proposition that states are free to develop diverse standards for liability in the defamation area.) Second, in no way could one interpret S. 687 as creating uniform state law. It has little or no effect on the many and varying standards of liability in existence other than to protect defendants in certain contexts and does nothing to standardize damages. It eliminates joint and several liability, but only for noneconomic damages.

Third, rather than creating uniformity, S. 687 creates a gross discrimination between parties in product liability cases and parties in other cases. None of the restrictions implicit in S. 687 are applicable outside of the product liability field. Even more troubling, the bill effectuates a discrimination between victims of pharmaceutical and aviation tragedies and victims of other tragedies in terms of the potential of recovering punitive damages.

Finally, rather than creating uniformity among the states, the bill is written in such a way that it requires state court interpretation of virtually every one of its major sections. In any action brought pursuant to S. 687 the district courts of the United States shall not have jurisdiction under 28 U.S.C. S 1331 (federal question jurisdiction) or § 1337 (jurisdiction over commerce and anti-trust regulations). S. 687, supra, § 5. In the absence of federal question jurisdiction, it is perfectly reasonable to assume that each state will spend the next twenty years trying to figure out how it will interpret S. 687.

> To come quickly to the point, we do not believe it is possible for Congress to preempt one area of the tort law of the States without creating new complexities for the Federal system and unsettling the whole body of State tort law. In short, there is no quick fix for what some perceive as the shortcomings of the present system. With each State court starting anew, such uniformity as we have achieved to date will be destroyed, and the long process to unravel new concepts will begin. In this process, State courts will not be, as they are now, the final arbiters of the tort law of their States. Federal regulatory standards, even without Federal question jurisdiction, will make the U.S. Supreme Court the last resort for a new class of cases with mixed State and Federal questions largely outside its current jurisdiction. A legal thicket is inevitable, and the burden of untangling it, if it can be untangled at all, will lie only with the Supreme Court, a court that many observers feel is already overburdened.

Product Liability: Hearings on 5.640 Before the Subcomm. on Consumer of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong., 1st Sess. 30-31

(1991) (statement of Hon. Harry L. Carrico, Chief Justice, Supreme Court of Virginia, on behalf of the Conference of Chief Justices).

Section 4(e) of S. 687 pertains to the effect of judicial decisions by the United States courts of appeals. Under that provision, the decisions of the various courts of appeals shall be controlling precedent for all federal and state courts within each circuit, "except to the extent that such decision is overruled or otherwise modified by the United States Supreme Court." S. 687, supra, §4(e). The inclusion of this provision represents a change from S. 687's predecessor, S. 640, 102d Cong., 1st Sess. (1991), in response to criticism that under S. 640 there would be no uniformity between state and federal courts within the same jurisdiction. Section 4(e) does not adequately address this concern.

Section 4(e) does not create federal question jurisdiction, but it makes decisions of each United States court of appeals interpreting S. 687 controlling precedent for all federal and state courts within the geographical boundaries of the circuit in which the court sits. Thus, the operation of §4(e) requires that a case involving issues under S. 687 first be brought in a Federal District court based upon diversity jurisdiction, that the case be properly appealed to a United States court of appeals, and that the court of appeals render a substantive decision on the particular issues raised under S. 687. Until this occurs on any issue under S. 687, the various state and federal courts within each circuit may develop divergent case precedents based upon different interpretations of the provisions of S. 687. Only when a particular issue under S. 687 is decided upon by a United States court of appeals will there be some semblance of uniformity among the federal and state courts within a federal circuit and only on that particular issue. Section 4(e) does very little, if anything, to create uniformity in product liability law. While this takes place, the federal courts—and in all likelihood the Supreme Court—will engage in the exercise, fretting about the application of the *Erie* Doctrine. While all this activity will give lawyers and law professors much to work on, this hardly seems the basis for enacting a federal bill.

The last remaining justification for a federal intrusion into the state law area is that the state systems have produced bad results, i.e., juries are awarding excessive and disproportionate amounts because they are unguided. This must be the reason for the drafters of S. 687 to put forward a national standard for culpability and burden of proof.

When Congress starts writing state law, particularly jury instructions, it must be because something is so wrong that the states are to be denied a function classically allocated to them. If, however, the states are doing a good job instructing juries and the awards that come back are justified based on the wisdom of the juries, then there is no basis for intrusion by the Congress.[10] In *Smith* v. *Wade,* 461 U.S. 30, 56 (1983), the Supreme Court found that "a jury may be permitted to assess punitive damages in an action under 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to federally protected rights of others." No more is required in terms of precision.

We trust juries to guard against the misuse of power and to demonstrate conscience, allowing them to assess community standards and make highly complicated decisions. *Taylor* v. *Louisiana,* 419 U.S. 522, 530 (1975); *Duncan* v. *Louisiana,* 391 U.S. 145, 155-56 (1968). Since the Supreme Court approves of properly instructed juries deciding matters of life and death, they should be trusted to continue to decide tort cases based on standards set by the states and "to make a fair assessment of punitive damages in a civil tort case." Demarest & Jones, Exemplary Damages as an Instrument of Social Policy: Is Tort Reform in the Public Interest, 18 St. Mary's L.J. 797, 824 (1987).

The jury does not function in a vacuum, but rather, it is subject to various judicial safeguards. The Supreme Court has recently recognized that, where such safeguards are properly applied, jury determinations of punitive damages awards ought to be given great deference in determining the constitutionality of such awards. In *TXO Production Corp.* v. *Alliance Resources Corp.,* the Supreme Court recognized the importance of judicial safeguards, including: a determination prior to trial that the jury is impartial; a determination that the jury's assessment of damages was the result of collective deliberation based on evidence and arguments of the adversaries; judicial review of the jury award by the trial judge; and appellate judicial review of the jury award and trial court review. *TXO Production Corp.* v. *Alliance Re-*

[10] If state law is "so vague and standardless * * * [and] leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards what is prohibited and what is not," then the law is void for vagueness. *Giaccio* v. *Pennsylvania,* 382 U.S. 399, 402-03 (1966).

sources Corp., No. 92-479, slip op. at 11 (U.S. Sup. Ct. June 25, 1993). The court stated: "Assuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable." Id. at 12 (citations omitted).

To suggest that jurors are inherently arbitrary or incapable of making intelligent choices in common tort cases offends the American system of jurisprudence.[11] Jurors take seriously the responsibility of assessing culpability and award amounts and, on a national levels tend to deny punitive damages in the vast majority of cases, making modest awards in those few cases where punitive damages are deserved. Daniels & Martin 1990 at 35-39, 56-60. From the earliest British punitive damage cases forward, there has been a "respect for the jury's discretion and a hesitancy to interfere with its judgment." Borowsky & Nicolaisen, Punitive Damages in California: The Integrity of Jury Verdicts, 17 U.S.F. L. Rev. 147, 152 (1983) (footnotes omitted). The underlying reason for empowering the jury in this area is obvious:

> [T]he jury is in the best possible position to function as the communities' conscience. The jury's reaction of shock and outrage presumably mirror those of the community as a whole. Thus when the jury decides to make a punitive award, it is expressing society's disapproval; and when it sets the amount of the award, it measures societies' outrage and determines the degree of punishment that society believes will deter the defendant and others like him.

Borowsky & Nicolaisen at 152-53.

BY RELIEVING PRODUCT SELLERS OF LIABILITY IN A STRICT LIABILITY CONTEXT, S. 687 CREATES DISINCENTIVES FOR PRODUCT SAFETY RESEARCH AND DISCOURAGES SELLERS FROM IMPROVING THE QUALITY OF INFORMATION DELIVERED TO CONSUMERS

Liability in Negligence

S. 687 provides that in a product liability action against a product seller other than a manufacturer the product seller will be liable only if the claimant can show that his or her harm was proximately caused by the product seller's negligence or breach of express warranty, S. 687, supra, § 202(a)-(b). Additionally, S. 687 contains provisions providing for product seller liability based upon the product seller being treated as a manufacturer. S. 687, supra, § 202(c).

In a negligence claim a plaintiff must show that the product which allegedly caused the harm complained of was sold by the defendant-product seller; the product seller failed to exercise reasonable care with respect to the product; and such failure to exercise reasonable care was a proximate cause of the claimant's harm. S. 687, supra, § 202(a)(1).

A product seller will not be liable under this negligence standard "where there was no reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, have revealed the aspect of the product which allegedly caused the claimant's harm." S. 687, supra, § 202(b)(3).

Under S. 687, in determining a product seller's negligence "the trier of fact may consider the effect of the conduct of the product seller with respect to the construction, inspection, or condition of the product, and any failure of the product seller to pass on adequate warnings or instructions from the product's manufacturer about the dangers and proper use of the product." S. 687, supra, § 202(b)(1). In order to establish a claim for failure to provide warnings or instructions a claimant must establish that either "when the product left the possession and control of the product seller, the product seller failed * * * to provide to the person to whom the product seller relinquished possession and control of the product any * * * written warnings or instructions received while the product was in the product seller's possession and control," S. 687, supra, § 202(b)(2)(A), or that the product seller failed "to make reasonable efforts to provide users with the warnings and instructions [which] it received after the product left its possession and control." S. 687, supra, § 202(b)(2)(B).

Liability for Breach of Independent, Express Warranty

Under the express warranty provisions of S. 687, for a product seller to be liable a claimant must show three elements: first, the claimant must show that the product seller made and express warranty independent of any express warranty made by the manufacturer regarding the same product; second, the claimant must show

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[11] The issue of the competence of jurors to make proper choices hardly seems proper for argument. See *Newport* v. *Fact Concerts*, 453 U.S. 247, 270 (1981); *Brotherhood of Elec. Workers* v. *Foust*, 442 U.S. 42, 50-51 (1979); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). See also *Gulf Atl. Life Ins. Co.* v. *Barnes*, 405 So. 2d 916, 925 (Ala. 1981), and compare *Commodore Corp.* v. *Bailey*, 393 So. 2d 467 (Miss. 1981).

that the product failed to conform to the warranty; third, the claimant must show that the failure of the product to conform to the product seller's warranty caused the plaintiff's harm. S. 687, supra, § 202(a)(2).

Treatment as a Manufacturer

S. 687 provides for the treatment of a product seller as a manufacturer in two circumstances, regarding the jurisdiction of state courts and the enforceability of judgments. Under S. 687, a product seller shall be liable as a manufacturer for harm caused by a product if "the manufacturer is not subject to service of process under the laws of any State in which the action *might* have been brought," S. 687, supra, § 202(c)(1) (emphasis added), or if "the court determines that the claimant would be unable to enforce a judgment against a manufacturer." S. 687, supra, § 202(c)(2).

Underlying Section 202 of S. 687 is the notion that sellers, wholesalers, or other product handlers cannot be liable under a strict liability theory unless the manufacturer of a product is unavailable for suit or is judgment proof. The premise supporting this proposition is that product sellers do not design or manufacture products, therefore they cannot be responsible strictly if the products are defective.

It is clear from the history of § 402(a) of the Restatement (Second) of Torts that those who sell products into the stream of commerce are to be subject to strict liability in tort. Contrary to the contentions of the proponents of this bill, 402(a) was not drafted to increase the pool of "deep pockets" available in a product liability litigation. Product sellers are in direct contact with manufacturers. They have tremendous influence on the quality of the products they sell. Product sellers have the opportunity to inspect the products they sell or will create such opportunities if they are subject to strict liability in tort. The overwhelming majority of courts "have extended strict liability to retailers." Prosser, Wade, and Schwartz, Torts—Cases and Materials 825, n.2 (7th ed. 1982).

Product sellers should be given incentives to inspect and test their products for quality and safety. They should be encouraged to engage in quality control practices. By eliminating strict liability in tort, making product sellers liable only on a negligence formulation, a critical market force is lost. Worse yet, by providing product sellers with an exception from liability in negligence "where there was no reasonable opportunity to inspect the product in a manner which would or should, in the exercise of reasonable care, have revealed the aspect of the product which allegedly caused the claimant's harm" (S. 687, supra, § 202(b)(3)), this bill creates an incentive for product sellers to behave in a way such that no reasonable opportunity to inspect will arise. Product sellers would be encouraged to adopt practices that would prevent them from having a "reasonable opportunity to inspect," thereby insulating themselves from liability in negligence.

It is the product seller who has the direct communication with the consumer, providing for the best opportunity for warnings. By virtue of S. 687, no strict liability action can be forthcoming based on failure to warn. S. 687 eliminates the desire of product sellers to provide optimal information regarding product risks to consumers. When the most likely basis of liability of a seller is negligence, the seller's information regarding a product or warnings will be judged based on a reasonability assessment. "Reasonability" is often assessed based on industry practices. It is thus possible that S. 687 might prompt sellers to limit data delivered to consumers. In a strict liability setting, it is to the seller's advantage to provide as much information as possible regarding a product; that is not the case in a negligence system.

The retail industry in the United States is as powerful an influence on the quality of products as any. If the giant retailers believe that a particular product they sell could be the basis of a product liability action, that product, in all likelihood, will be dropped immediately. No one consumer, group of consumers, or national consumer organization is anywhere near as powerful as the major retailers. Retailers push hard to insist on high quality in the products they sell, in part because they are exposed to strict liability in tort. By the passage of S. 687, that critical pressure will be lost.

Product sellers profit from the sale of their products. When they place into the stream of commerce a product that is fundamentally defective, it should not be an excuse that they failed to realize that the product that they sold was "in a defective condition unreasonably dangerous to user or consumer." § 402(a) of the Restatement (Second) of Torts.

Product sellers often demand contractual indemnification from manufacturers in the event there is a product liability action. Such indemnification contracts force manufacturers to take additional steps to ensure that the products they sell are not defective. These are beneficial effects of the existence of maintaining liability for product sellers in a manner that goes beyond common law negligence. S. 687 re-

moves those incentives. There is no reason to pass this provision in S. 687 unless it is the desire of the Congress to provide insulation for sellers who sell unreasonably dangerous products.

S. 687 also eliminates the entire theory of implied warranty as it is applied to product sellers. This is done by the broad preempting language of §§4 and 201 and by limitations of §202. It is one thing to pass a piece of legislation that seeks to modify state tort law, but quite another to approve a bill that abolishes a section of the Uniform Commercial Code. Nevertheless, that would be the effect of this bill.

The evolution of strict liability in tort has been heavily influenced by warranty and non-warranty concepts. A number of states have used the ideas underlying implied commercial warranty and expanded them to the point where product sellers, as well as manufacturers, become strictly liable if the products sold are defective and injure a third person, whether a purchaser, user, or any other individual affected by the product. A second group of states has come to a similar conclusion through the use of §402(a) of the Restatement (Second) of Torts. Suffice it to say that in a large number of states liability is imposed on product sellers, wholesalers, manufacturers, and others placing products into the stream of commerce if the product turns out to be defective, and by virtue of that defect, unreasonably dangerous.

By eliminating strict liability for product sellers, S. 687 radically alters the two principal lines of product liability law developed by the states. Recourse against product sellers in negligence and express warranty under S. 687 provides injured plaintiffs nothing that was not available for the last half century and prior to the rise of §402(a). S. 687 turns back the clock to a time when standards of liability for sellers were inadequate for the protection of consumers, a time when such inadequate standards gave rise to §402(a) of the Restatement (Second) of Torts.

At a time when "competitiveness" seems to guide much of the activity of the Congress, it is troubling to think that Congress would take steps to make product sellers unaccountable for the harm they cause when they sell a dangerous product that is defectively produced.

The response to these criticisms is that product sellers are not unaccountable; instead, they can be sued in negligence. As to the matter of negligence, S. 687 is a profound lost opportunity to deal with the true problems that gave rise to the adoption of strict liability in the first place.

Strict liability and product liability cases came into existence because the negligence system was cumbersome, defense oriented, and insufficient to address consumer injury. Too many people who were injured by products were unable to probe the depths of diverse industrial communities to determine the standard of care needed for comparative purposes. Had S. 687 dealt with the fundamental deficiencies in negligence, it might be more worthy of the consideration of this Committee; unfortunately, it did not do so.

S. 687 does not deal with the complex problems of proof, res ipsa loquitur, and burden of proof that plague the negligence system. It does not deal with discovery, record retention, or other proof-assisting mechanisms that are required to make a negligence formulation work. S. 687 does not deal with the delays that plague the dockets of the various courts; it does not deal with judicial "gag orders" often used to suppress the flow of product safety information; it does not address delaying tactics by the defense and insurance communities that have made litigation extraordinarily expensive for victims.

In short, S. 687 does nothing to improve the negligence system. Nevertheless, it abolishes strict liability for product sellers and then drops victims into a world of negligence that we already know to be insufficient to protect the rights of those who have been injured by defective products.

THE PUNITIVE DAMAGES SECTION OF THIS BILL IS UNJUSTIFIED, ANTICOMPETITIVE, AND DANGEROUS

General Rule

Under S. 687, in any civil product liability action against a manufacturer or product seller, the determination of liability for punitive damages is to be made under "applicable law." S. 687, supra, §203(a). However, S. 687 provides for a uniform burden of proof and a uniform standard of liability. A claimant bust establish by clear and convincing evidence that the harm suffered "was the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons who might be harmed by the product." S. 687, supra, §203(a). Furthermore, S. 687 provides that "the failure to exercise reasonable care in selecting among alternative product designs, formulations, instructions, or warnings" by itself is insufficient to amount to such conduct. S. 687, supra, §203(a). Finally, punitive

damages may not be awarded in the absence of compensatory damages. S. 687, supra, § 203(a).

Bifurcation of Trials

Under S. 687, a manufacturer or product seller may request a separate proceeding either to determine punitive liability and punitive damages, or solely to determine punitive damages when punitive liability was previously determined. Such a request is binding upon the trier of fact. "If a separate proceeding is requested, evidence relevant only to the claim of punitive damages, as determined by applicable State law, shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded." S. 687, supra, § 203(d).

Determination of Amount of Punitive Damages: General Rule; Factors to be Considered

The general rule is that the trier of fact shall consider all relevant evidence, including the severity of the harm; the duration of the conduct or concealment of it; the profitability of the conduct; the number of products sold; awards of punitive or exemplary damages to persons similarly situated to the claimant; prospective awards of compensatory damages to persons similarly situated to the claimant; any criminal penalties imposed upon the defendant as a result of the conduct complained of; the amount of any civil fines assessed against the defendant as a result of the conduct complained of; and the financial condition of the defendant. S. 687, supra, § 203(e)(1)-(9).

F.D.A. Standards, Absolute Defense to Punitive Damages

General Rule

S. 687 provides for an absolute defense to punitive damages for manufacturers and product sellers of certain drugs and medical devices, as defined in the Federal Food, Drug, and Cosmetic Act §§ 201(g)(1) and 201(h), 21 U.S.C. §§ 321(g)(1) and 321(h), under a "pre-market approval" standard and a "generally conforming" standard. A manufacturer or product seller shall not be liable for punitive damages (1) where the harm causing aspect of the drug or device, or the adequacy of the packaging and labeling of the drug or device, was subject to and in fact received premarket approval by the Food and Drug Administration, S. 687, supra, § 203(b)(1)(A), or (2) where the drug, device, or packaging and labeling is generally recognized as safe and effective binder conditions established by the Food and Drug Administration and applicable regulations. S. 687, supra, § 203(b)(1)(B).

Exceptions

Under S. 687, this absolute defense shall not apply where the defendant, before or after pre-market approval, withheld from or misrepresented to the Food and Drug Administration or any other agency or official of the federal government required, material, and relevant information. S. 687, supra, § 203(b)(2)(A). The applicability of this exception to information required after pre-market approval is an expansion of the predecessor provision in S. 640.

Illegal Payments

Under S. 687, this defense shall not apply where the defendant "made an illegal payment to an official or employee of the Food and Drug Administration for the purpose of * * * securing or maintaining approval of such drug or device." S. 687, supra, § 203(b)(2)(B).

F.A.A. Standards; Absolute Defense to Punitive Damages

General Rule

S. 687 provides an absolute defense against punitive damage claims for the manufacturer of an aircraft or aircraft component which was 1) subject to pre-market certification by the Federal Aviation Administration with respect to the safety of the design or performance of the harm-causing aspect of such aircraft or component or with respect to the adequacy of the warnings regarding the operation or maintenance of such aircraft or component; 2) actually certified by the F.A.A.; and where 3) after delivery the manufacturer complied with F.A.A. requirements and obligations with respect to continuing airworthiness, including the requirement to provide maintenance and service information related to airworthiness whether or not such information is used by the F.A.A. in the preparation of mandatory maintenance, inspection, or repair directives. S. 687, supra, § 203(c).

Exceptions: Misrepresentation or Withholding of Required, Material and Relevant Information; Illegal Payments

This provision shall not apply where 1) "the defendant, before or after pre-market certification * * * withheld from or misrepresented to the [F.A.A.] required information that is material and relevant to the performance or the maintenance or operation of such aircraft or component or [sic] (probably "and") is causally related to the harm which the claimant allegedly suffered." S. 687, supra, § 203(c)(2)(A), or 2) the defendant "made an illegal payment to an official of the Federal Aviation Administration for the purpose of either securing or maintaining certification for such aircraft or component." S. 687, supra, § 203(c)(2)(B). The latter provision is an addition to S. 640, supra, (1991).

The first part of this testimony makes clear that there is no tort crisis and particularly no punitive damage crisis. The amount of dollars paid out for punitive damages is so insubstantial that it barely appears in any of the major studies of the tort system. Nevertheless, punitive damages are a rallying cry for "tort reform."

The operant sections of S. 687 require that every state in the United States adhere to the federal mandate of a standard of "conscious, flagrant indifference" and that liability be imposed only based on "clear and convincing evidence." Conscious, flagrant indifference is a standard requiring more than intent. As such, it requires a level of culpability in excess of a criminal case. Even if one believes manufacturers need greater protection, the standard in this section is grand legislative overkill.

This provision would change the law in numerous jurisdictions and would reward entities that today can have liability imposed on them for gross or wanton behavior. The language of S. 687 is also confusing in that it appears to relieve defendants from liability if the plaintiff was not "a person who might be harmed by the product." This phrase has no apparent meaning. The punitive damages section of the bill also would relieve the defendant from liability if it has complied with F.D.A. or F.A.A. standards.

Punitive damages serve multiple beneficial social objectives. The dilution of punitive damages found in § 203 obscures these objectives. In some states, defendants can have punitive damages imposed based on a less onerous test than that found in § 203. Where the defendant's behavior demonstrates a "reckless disregard of the plaintiff's rights," several states would allow for punitive damages regardless of compliance with government standards. *Wangen* v. *Ford Motor Co.*, 294 N.W.2d 437 (Wisc. 1980). When a defendant acts with "indifference" to the health and safety of an injured plaintiff, punitive damages are permissible whether the indifference is conscious or not. *Moore* v. *Remington Arms*, 427 N.E.2d 608 (Ill. 1981). Section 500 of the Restatement (Second) of Torts permits awarding punitive damages after a showing of reckless indifference, a standard different than conscious indifference.

As to the matter of compliance with government standards, *Gryc* v. *Dayton-Hudson*, 297 N.W.2d 727 (S. Ct. Minn. 1980), held that compliance with governmental standards does not bar punitive damages. Government standards may not reflect the state of knowledge of an industry concerning safety consequences of a particular practice.[12] Further, if compliance with F.D.A. and F.A.A. standards is sufficient to bar punitive damages, one would have to wonder if compliance with other government standards is also sufficient to bar punitive damages. In fact, an expansion of this concept is evident in that S. 687, by including an F.A.A. standards defense, already goes beyond a similar bill in the House of Representatives, H.R. 1910, which provides a defense for compliance with F.D.A. standards.[13]

Standards can quickly become out of date due to the arduous process of modifying regulations. When this happens, compliance with standards should never serve as a bar, particularly where the manufacturer producer is aware of the illegitimacy of the existing standard.

The Food and Drug Administration's standards are important for improvement of pharmaceutical products but should not serve as a bar to punitive damages. There are too many examples of F.D.A. approved products causing injuries. A recent G.A.O. report found that approximately one-half of the drugs approved by the FDA

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[12] It is the dangerous nature of certain products which gives rise to their being subject to government regulations. "[H]istory does not suggest that the regulatory systems governing these products have been so effective in protecting the public that the tort system, with its punitive damage component, has been rendered unnecessary as an incentive for product safety." Teresa Moran Schwartz, Punitive Damages and Regulated Products, 42 Am. U. L. Rev. 1335, 1348 (1993).

[13] Only five states (Arizona, New Jersey, Ohio, Oregon, and Utah) have enacted legislation providing limitations or bars against punitive damages where a product complies with government regulations, and only with regard to FDA-approved drugs and devices. See Teresa Moran Schwartz, Punitive Damages and Regulated Products, 42 Am. U. L. Rev. 1335, 1338 (1993).

had "serious post-approval risks. * * *" United States Congress General Accounting Office, "FDA Drug Review: Post Approval Risks 1976-1985," GAO/PEMD-90-15 (April 1990) at 3. This does not suggest that the F.D.A. is failing to do its job; rather, it suggests that the process of approving drugs is difficult and time consuming. The government is often under enormous pressure to put drugs on the market and is also not always the first to know when problems begin to appear with a particular product. If a manufacturer becomes aware of problems with a pharmaceutical product and continues to keep that product on the market, it is appalling to think that a federal product liability bill would keep that manufacturer clear of punitive damages for such offensive misconduct.

A government standards defense may encourage manufacturers to take a lowest common denominator approach to safety since manufacturers would not be punished for failing to take adequate safety precautions where a government standard required far less care.[14]

Dilution of the capacity of consumers to receive punitive damages, either because of harsh, defense-oriented standards or by government standards defense is bad policy and contrary to basic law. In *Day* v. *Woodworth,* 54 U.S. (13 How.) 363, 371 (1851), the Supreme Court found that punitive damages are proper, so much so that argument as to their validity was not tolerated.[15] In *Missouri Pacific Ry.* v. *Humes,* 115 U.S. 512, 521 (1885), the Court approved the use of punitive damages to "blend together the interests of society and the aggrieved individual." Constitutionality of punitive damages was considered in *Minneapolis & St. Louis Ry.* v. *Beckwith,* 129 U.S. 26, 36 (1889), holding: "The imposition of punitive or exemplary damages * * * cannot be opposed as in conflict with the prohibition against the deprivation of property without due process of law." Looking to the legal systems in the United States, Great Britain, and even to Roman law, it is evident that punitive damages are a fundamental part of our jurisprudence.[16] To accept the F.A.A. and F.D.A. government standards defenses of S. 687 would dilute the longstanding entitlement to punitive damages.

Punitive damages are vital to the protection of consumers. With the minimum of transaction costs, they achieve the dual goals of punishment of specific actors and industry-wide deterrence for future misconduct and creation of incentives to upgrade the quality of goods and services.[17] Individuals who suffer at the hands of others whose behavior is sufficiently bad to be characterized as intentional or wanton misconduct are in no way winners of some bizarre lottery. The destruction of family life, the trauma of protracted litigation, the displacement of emotional equilibrium, and various costs[18] pertaining to pursuing legal claims can be addressed by a puni-

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[14] Were one seriously interested in improving the lot of consumers, a better provision might be to draft something that echoes *Hoskins* v. *Jackson Grain,* 63 So. 2d 514 (Fla. 1953), in which nonconformity with a statute was found to be the basis of negligence per se. See also *Dawson* v. *Chrysler Corp.,* 630 F.2d 950 (3d Cir. 1980).

[15] Common law affirmation of punitive damages can be traced back centuries through the Magna Carta, see Browning-Ferris, 109 S. Ct. 2909, 2919-20 (1989), but usually begins with a look at *Wilkes* v. *Wood,* 98 Eng. Rep. 489 (K.B. 1763), and *Huckle* v. *Money,* 2 Wils. K.B. 205, 95 Eng. Rep. 768 (1763). The nineteenth century view of punitive damages was that the doctrine was "too well settled now to be shaken, that exemplary damages may in certain cases be assessed." *Milwaukee & St. Paul Ry.* v. *Arms,* 91 U.S. 489, 492 (1875); *Fleet & Semple* v. *Hollenkemp,* 52 Ky. (13 B. Mon. 219) 175, 180 (1852); *Merrells* v. *The Tariff Mfg. Co.,* 10 Conn. 388 (1835); *Linslet* v. *Bushnell,* 15 Conn. 225 (1842).

[16] D. Pugsley, The Roman Law of Property and Obligations 31 (1972); B. Nicholas, Roman Law 210 (1962); Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1258, 1262 n.17 (1976); The Vitality of the Doctrine of Punitive Damages in Maine, 35 Me. L. Rev. 447, 451 (1983).

[17] Beyond punishment and deterrence, punitive damages provide resources to aggrieved plaintiffs who have been thrust into an abnormal risk category. See, e.g., *Evans* v. *Philadelphia Transportation Co.,* 418 Pa. 567, 212 A.2d 440 (1965); *Focht* v. *Rabada,* 217 Pa. Super. 35, 268 A.2d 157 (1970); Restatement (Second) of Torts §908 (1979). A few states are straightforward in discussing the functions of punitive damages beyond punishment and deterrence: *Hicks* v. *Herring,* 246 S.C. 429, 144 S.E.2d 151, 155 (1965), allows punitive damages to vindicate a private right. *Jolley* v. *Puregro Co.,* 94 Idaho 702, 496 P.2d 939, 947 (1972), permits punitive damages for "rectification of wrongs"; *Oppenhuizen* v. *Wennersten,* 2 Mich. App. 288, 139 N.W.2d 765 (1965), permits punitive damages to address embarrassment.

[18] A very few states permitted punitive damages for the purpose of assisting with attorneys fees. *Lanese* v. *Carlson,* 32 Conn. Supp. 163, 344 A.2d 361, 364 (1975); *Doroszka* v. *Lavine,* 111 Conn. 575, 578, 150 A. 692, ——— (1930). Other jurisdictions allow punitive damages for "inconvenience, reasonable attorneys fees, and other losses too remote to be considered under actual damages." *Pan Am Petroleum* v. *Hardy,* 370 S.W.2d 904, 908 (Tex. Civ. App. 1963). Other states recognize that punitive damage awards encourage private persons to bring wrongdoers before the court, e.g., *Snowden* v. *Osborne,* 269 So. 2d 858 (Miss. 1972).

tive damage award. Owen, Punitive Damages in Product Liability Litigation, 74 Mich. L. Rev. 1257, 1296-98 (1976).

It is argued regularly that compensatory damages cover the needs of injured persons and deter future misconduct. Such arguments are devoid of empirical support.[19] Punitive damages are often awarded after a multi-year pattern of misconduct, interspersed with various compensatory damage awards which did not deter the defendant, prompting the Supreme Court of Minnesota to conclude that punitive damages are particularly effective in preventing repetitive forms of misconduct. *Gryc* v. *Dayton-Hudson*, 297 N.W.2d 727 (S. Ct. Minn. 1980).

In the state of New York, the deterrence function of punitive damages is well recognized:

> A judgment simply for compensatory damages would require the offender to do no more than return the money which he had taken from the plaintiff. In the calculation of his expected profits, the wrongdoer is likely to allow for a certain amount of money which will have to be returned to those victims who object too vigorously, and he will be perfectly content to bear the additional cost of litigation as the price for continuing his illicit business. It stands to reason that the chances of deterring him are materially increased by subjecting him to the payment of punitive damages.

Walker v. *Sheldon*, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499 (1961).

The need for punitive damages in many industries is clear. In the insurance industry the need is undeniable.

> If an insurance company could not be subjected to punitive damages it could intentionally and unreasonably refuse payment of a legitimate claim with veritable impunity. To permit an insurer to deny a legitimate claim, and thus force a claimant to litigate with no fear that the claimant's maximum recovery could exceed the policy limits plus interest, would enable the insurer to pressure an insured to a point of desperation enabling the insurer to force an inadequate settlement or avoid payment entirely.

Standard Life Ins. Co. v. *Veal*, 354 So. 2d 239, 248 (Miss. 1977). In insurance relationships the potential of punitive damages provides consumers with some force at the bargaining table.

> [T]he relationship of insurer and insured is inherently unbalanced; the adhesive nature of insurance contracts places the insurer in a superior bargaining position. The availability of punitive damages is thus compatible with the recognition of insurers' underlying public obligation and reflects an attempt to restore balance in the contractual relationship.

Hirsch, Strict Liability: A Response to the Gruenberg-Silberg conflict Regarding Insurance Litigation Awards, 7 S.W.U. L. Rev. 310, 326 (1975).

As a result of the impact of punitive damages and the tort system, "products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit." Webber, "Product Liability: The Corporate Response," The Conference Board, Report No. 893 (1987) 2. These are the benefits that the state product liability system has created. Reducing these benefits by passing S. 687 is at odds with the best interests of the American public.

Finally, a provision that relieves manufacturers of the potential of punitive damages so long as its product is in compliance with a government standard is anticompetitive and likely to deaden innovation. Once government standards issue, the motivation to improve a product declines dramatically. If manufacturers are given the protection inherent in S. 687, we can look forward to years of reduced product innovation. Given the concerns regarding competitiveness, this seems to be hardly a desirable result.[20]

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[19] *Walker* v. *Sheldon*, 10 N.Y.2d 401, 406, 179 N.E.2d 497, 499 (1961); *Campus Sweater & Sportswear Co.* v. *M.B. Kahn Construction Co.*, 515 F. Supp. 64, 104-05 (D.S.C. 1979), aff'd, 644 F.2d 877 (2d Cir. 1981), holding that punitive damages deter manufacturers from misconduct, encourage the production of safer products, and "serve as a type of private revenge which is carried out in the courts rather than through duels or in back alleys." The court held further "there is no exact monetary standard which can be used as a measure. * * * There is no formula for punitives as the amount to be awarded is peculiarly within the judgment and discretion of the jury, subject to the supervisory powers of the trial judge over jury verdicts. * * * The main things to be considered are the character of the tort committed, the punishment which should be meted out therefore, and the ability of the wrongdoer to pay." 515 F. Supp. at 105-06.

[20] According to the testimony of Joseph Goffman and others before this Committee on S. 2760, the Product Liability Reform Act, delivered September 10, 1986, "[a]lthough the manufacturer of the Bjork-Shiley heart valve knew that over 100 patients suffered a fracture of the device's

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ELIMINATION OF JOINT AND SEVERAL LIABILITY FOR NONECONOMIC LOSS PLACES AN UNDUE BURDEN ON INJURED PERSONS

With respect to noneconomic damages, S. 687 provides for a uniform rule of several liability for defendants in product liability actions. Each defendant's liability for noneconomic damages shall be several only and shall not be joint. Such liability shall be in direct proportion to the defendant's percentage of responsibility, as determined by the trier of fact, and "[a] separate judgment shall be rendered against such defendant for that amount." S. 687, supra, § 206.

Section 206 of S. 687 would prohibit the imposition of joint and several liability for noneconomic loss. Presumably, the drafters of S. 687 want to ensure that plaintiffs always receive full compensation for economic losses but that it is somehow not necessary to ensure that plaintiffs receive full recovery if the losses sought are noneconomic. This section appears to be premised on the assumption that noneconomic losses are fuzzy benefits to which plaintiffs do not have a firm entitlement. Although there is not much room for extensive legal analysis in this area, there certainly is room for disagreement.

I find § 206 to be particularly offensive because it denies the reality of pain and suffering that can accompany a product-related injury. Pain has a biological or physiological basis. Discomfort, agony, and pain are not easily quantified, but they are most assuredly real and of great concern to injured persons.

Former Chief Justice Byrd articulated the plight of injured persons with limited economic loss as follows:

> For a child who has been paralyzed from the neck down, the only compensation for a lifetime without play comes from noneconomic losses. Similarly, a person who has been hideously disfigured receives only noneconomic damages to ameliorate the resulting humiliation and embarrassment.
>
> Pain and suffering are afflictions shared by all human beings, regardless of economic status. For poor plaintiffs, noneconomic damages can provide the principal source of compensation for reduced lifespan or loss of physical capacity. * * * [O]ften these plaintiffs may be unable to prove substantial loss of future earnings or other economic damages.

Fein v. *Permanente* Group, 695 P.2d 665, ——— (Cal. S. Ct. 1985) (Byrd, C.J., dissenting).

The research on pain and suffering is gruesome and need not be replicated in this testimony. Suffice it to say that for decades courts have dealt with the difficult question of quantification but have managed to provide funds in the form of non-economic losses for the phenomenon of pain. The mere fact that pain and suffering are difficult to quantify should not mean that plaintiffs are somehow not entitled to joint and several liability, an entitlement that plaintiffs have for all other aspects of damages.

Brain injuries, blindness, and different forms of paralysis can result in limited "billable" damages. These medical tragedies can destroy lives in ways that are not reflected in medical expenses, lost salaries, or other components of economic damages. For that reason, juries are given the opportunity to assess a certain amount of money for pain and suffering; it would be wrong to pass a law that creates an obstacle to collecting these sums.

By making joint and several liability unavailable for noneconomic damages, those plaintiffs with the most devastating injuries would end up under-compensated, even though they have proved up the liability of the defendant. Such victims would be forced to pursue each party who had been responsible for the victim's injury, a task that might strip away resources required to have the victim survive. This is a cruel outcome, completely unjustified by anything put forward in the literature regarding the tort system or in the reasoning supporting this bill. It is a patent attempt to protect manufacturers who are otherwise protected by indemnification, contribution, and other cross-party relief mechanisms.

Joint and several liability occurs only in those circumstances where the defendants act collectively or where the injuries they cause are not readily divisible. In the absence of joint and several liability, a plaintiff will have to overcome innumerable evidentiary obligations to prove specific injury caused by each defendant. In a product liability context, this seems an extraordinarily harsh burden. Plaintiffs would have to sue all parties who are remotely connected to their injury to protect against the possibility that they would be denied essential noneconomic damages. In cases pertaining to toxics such as asbestos where numerous parties are involved,

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strut and that there were many resulting fatalities, recall was resisted. * * * Similarly, the drug industry fought the FDA staff's desire to require relabeling on aspirin * * * that warned of the possibility of death when aspirin was used to treat children for flu. * * *

it might be impossible to sort out which defendant caused a particular percentage of the plaintiff's loss to allow for full recovery of noneconomic damages.

The elimination of joint and several liability then would make it extraordinarily difficult for innocent injured plaintiffs to be made whole. If a defendant is substantially responsible for harm caused by a product, the common law for the last hundred years has made that defendant fully responsible for those injuries. Defendants who believe others were involved can bring those others into the lawsuit and allow the jury to apportion damages. To force the apportionment by federal law, however, is unjust and unfair.

It is also worth noting that the existence of joint and several liability provides strong incentives for parties to engage in the negotiation and settlement process. When multiple defendants are involved, it is not unusual for several to settle with a plaintiff in advance of litigation to avoid the possibility of being found responsible for harms caused by other parties. Such settlements are beneficial to those who have been profoundly injured and are in desperate need of resources. They also benefit the litigation process by simplifying the issues juries must resolve.

Those who have been victims of product failures know all too well the agonies of the litigation process. Contrary to the positions put forward by the proponents of "tort reform," plaintiffs in product liability cases for the most part are people in extraordinarily desperate circumstances. Such persons are a part of families whose expectations have been shattered by traumatic injury, illness, or death. Financial reserves are generally depleted in such circumstances, and the psychological condition of the victim and the family of the victim is often very poor.

The impact of protracted tort litigation on persons suffering from profound injury is horrifying. Although we might all smile at the few anecdotal cases put forward by the proponents of "tort reform" in which the tort system appears for a brief moment to look silly, none of us smile when we are forced to consider the fact that the tort system generally deals with persons whose lives have been ruined through no fault of their own.

Over the last twelve years I have had the opportunity to work with a number of organizations that assist head-injured individuals. Because of an experience affecting one of my children, I share the sadness of those families of head-injured children and some years ago wrote an article, "The Profoundly Injured Child: How to Assess the Damage to the Family Unit," 20 Trial 28 (July 1984), trying to set forth some of the research regarding family injury.

After a profound injury occurs, a family goes into mourning. Within a relatively short period of time, assuming the injury was the fault of another person or entity, the family must begin to work within the legal system to secure appropriate relief. I have seen many families move forward into the legal system only to find it complex and emotionally devastating. Depositions require mothers and fathers to relive the most horrible and tragic moments of their lives. It is not uncommon to see plaintiffs so completely overwrought by the deposition process that they find themselves incapable of going forward with the trial. Those who do go forward with trial find the process to be deeply painful. Although lawyers, judges, and juries often experience a certain catharsis from the conclusion of a difficult personal injury case, injured persons and their families have no such relief. Their pain is continuous, their sorrow chronic. To impose on people the obligation to pursue the litigation process with each and every defendant who was substantial Iv responsible for causing the harm to the victim is inhuman.

Section 206 of S. 687 regarding noneconomic loss and joint and several liability devalues the reality of pain. It places a hurdle in front of those who are least capable of circumventing yet another legal obstacle. I object most strenuously to this provision.

OTHER PROVISIONS

Time limitations on Liability

Statute of Limitations

S. 687 provides for a uniform two-year statute of limitations in product liability actions. A product liability action must be filed within two years of the time the claimant discovered, or in the exercise of reasonable care, should have discovered the harm and its cause. S. 687, supra, § 204. There is a special rule for persons who are legally disabled which permits such persons to file an action within two years after his or her disability ceases. S. 687, supra, § 204. Finally, "[i]f the commencement of [a product liability action] is stayed or enjoined, the running of the statute of limitations * * * shall be suspended for the period of the stay or injunction." S. 687, supra, § 204.

Statute of Repose for Capital Goods

Generally, S. 687 provides for a 25-year statute of limitations, measured as of the time of delivery of the product, in actions in which the product alleged to have caused the harm was a capital good, but "only if the court determines that the claimant has received or would be eligible to receive compensation under any State of Federal worker's compensation law for harm caused by the product," and only if the harm is not a toxic harm, S. 687, supra, § 204(b).

Motor vehicles, vessels, aircraft and trains used primarily to transport passengers for hire are excluded from these provisions. S. 687, supra, § 204(b)(2). The time period is measured from the time a product is delivered to its first purchaser or lessee who was not engaged in the business of manufacturing, selling, or using such product as a component part of another product. S. 687, supra, § 204(b)(3)(B).

Section 204(b) of S. 687 requires brief commentary. Section 204(b) would impose a repose period of 25 years, presumably from the date a product is placed on the market.

> Statutes of repose by their nature reimpose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps even before it exists, and their constitutionality has been challenged on a variety of state and federal grounds. Although some of the statutes have been declared unconstitutional, the courts in most jurisdictions have upheld their statutes. * * *

Prosser and Keaton, Torts (5th ed. 1984) 168.

A number of jurisdictions have sought to implement statutes of repose while others have rejected them. Just exactly why the Congress believes this is now a matter requiring attention of our federal legislature is a bit hard to understand. If a product has a useful life in excess of 25 years, and if the manufacturer benefits from having a long-term product on the market through the price it can command for such a product, it is unjust to relieve the manufacturer of responsibility should that product prove defective during its useful life. To be sure, there are circumstances when a product is altered or changed or where the product has lived its useful life, and thereafter liability to the manufacturer is not appropriate. Such circumstances are dealt with effectively under state law and do not require federal intervention. (For a listing of cases involving statutes of repose, see *Ketterton* v. *Long Mfg.*, 314 N.C. 44, 332 S.E.2d 67, 75 (1985).)

Workers' Compensation Offset

S. 687 provides that an employer or workers' compensation insurer shall have the right to subrogation against a manufacturer or product seller in a product liability action by an employee for the sum of the amount paid to, and the present value of amounts that will be paid to, such employee as workers' compensation for harm caused by a product. S. 687, supra, § 205(a)(1). The employer or insurer shall have the right to participate in the lawsuit or any settlement proceedings in order to assert its right of subrogation. S. 687, supra, § 205(a)(1), (2). The employee-claimant shall not make any settlement with, accept any payment from, or enter any release or other agreement with the defendant without the written consent of the employer or insurer, unless the employer or workers' compensation insurer is made whole for all benefits paid in workers' compensation benefits. S. 687, supra, § 205(a)(2).

If the defendant alleges that the employee-claimant's harm was caused by the fault of the employer or a co-employee (not including intentional torts or acts outside the scope of employment committed by a co-employee), the employer is entitled to written notice from the defendant and to appear in the action as if it were a party. S. 687, supra, § 205(a)(3). If the defendant proves such allegation by clear and convincing evidence, then the court shall reduce any judgment against the defendant by the sum of the amount paid and the present value of the amounts to which the employee is or would be entitled as workers' compensation benefits. S. 687, supra, § 205(a)(3). The defendant shall have no further right, by way of contribution or otherwise, against the employer. S. 687, supra, § 205(a)(3). If the defendant fails to drove such allegation, then the defendant shall reimburse the employer or insurer for reasonable attorney's fees and court costs incurred in the resolution of the subrogation claim. S. 687, supra, § 205(a)(4).

One function of section 205 of S. 687 is to eliminate the employer's subrogation lien if the employer has contributed to the injury of the employee by maintaining an unsafe workplace or otherwise engaging in unsafe conduct. Although this may have the effect of encouraging employers to maintain a safe work environment, the entire section is designed to protect manufacturers and to limit the liability of insurers engaged in the workers' compensation business. Quite obviously, if it had been the intention of the drafters to encourage workplace safety, some attention would have been given to O.S.H.A.-type standards, employer liability for maintaining an

unsafe workplace, the exclusivity doctrine whereby employers are immunized from product liability litigation in a workers' compensation situation, or similar factors.

Instead, § 205 is an attempt at isolating a manufacturer, explicitly prohibiting an employer or a workers' compensation insurance carrier from ever having subrogation, contribution, or implied indemnity against a manufacturer outside of those circumstances where the harm to the employee was not caused by the employer "or co-employees."[21]

Another component of § 205 requires an offset whereby a manufacturer found liable in a product liability action will have subtracted from its liability any sum that has been paid under a workers' compensation claim, including "the present value of all workers' compensation benefits to which the employee is or would be entitled. * * *"[22] This provision limits the capacity of victims to collect workers' compensation, a sum to which they have an independent entitlement, as well as recovering in tort for harms caused by the manufacturer. This denies consumers a right that exists in several jurisdictions.

Although there are other interpretations of § 205, one would be hard-pressed to read this section as providing benefits to consumers or incentives for safer workplace environments.

Defenses Involving Intoxicating Alcohol or Drugs

S. 687 provides for a complete defense to product liability actions involving intoxicating alcohol or drugs. S. 687 makes a distinction between actions in which all defendants are manufacturers and product sellers and actions in which not all defendants are manufacturers and product sellers.

Under S. 687, where all defendants are manufacturers or product sellers, it is a complete defense to a product liability action where the claimant was intoxicated or was under the influence of intoxicating alcohol or any drug, and, as a result of such intoxication or influence, the claimant was more than 50 percent responsible for causing the accident or event which resulted in the claimant's harm. S. 687, supra, § 207(a). This defense is also available under S. 687 where not all defendants are manufacturers and product sellers. However as a condition to using this defense it must first be established that no liability exists against those defendants who are not manufacturers or product sellers, and then "the court shall enter a judgment notwithstanding the verdict in favor of any defendant which is a manufacturer or product seller." S. 687, supra, § 207(b).

S. 687 provides that "the determination of whether a person is intoxicated or under the influence of intoxicating alcohol or any drug shall be made pursuant to applicable State law." S. 687, supra, § 207(c). "The term 'drug' means any non-over-the-counter drug which has not been prescribed by a physician for use by the claimant." S. 687, supra, § 207(d).

The drug and alcohol defense in Section 207 has only one effect: it imposes a fifty/fifty comparative fault model in those cases where the user of a product engaged in misuse and was affected by drugs or alcohol. If a defective product injures an intoxicated consumer, the manufacturer will be relieved of all responsibility for producing the defective product if a jury finds that fifty percent or more of the consumer's injury was attributable to the consumer's substance abuse.

This policy has a negative effect on the safety interests of all other consumers, not intoxicated, who might come into contact with this product. While I do not quarrel with the idea that consumers must be responsible for unsafe behavior, it does not follow automatically that the manufacturer should be completely relieved of liability when the consumer's misconduct is 51 percent the cause of a particular injury. The broad purposes of product liability law are frustrated by such a rule.

The decision regarding the use of fifty/fifty comparative fault versus contributory negligence or a different model of comparative fault ("pure" comparative fault, lesser than or greater than comparative fault, etc.) is a decision that states have resolved over the years without federal intervention. This decision-making process has produced numerous refinements in the tort field. It seems a shame to lock a law into place, demanding that the states adopt this particular model in light of its adverse effect on certain populations of product users. States should be free to use pure comparative fault in conjunction with § 402(a) of the Restatement (Second) of Torts and decide whether a manufacturer should be responsible for the injury actually caused to the extent the manufacturer's defective product was responsible for the harm.

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[21] The insertion of co-employees into Section 205 raises the question of whether the bill is an attempt to reassert the fellow servant defense in negligence cases.

[22] Section 205(a). This language is problematic because it assumes an offset where a victim is not yet in possession of essential resources.

Expedited Product Liability Judgments

Under S. 687, § 101, either a claimant or defendant in a product liability action may make an offer of judgment for a specific dollar amount as complete satisfaction of the claim. S. 687, supra, § 101(a)-(b). If the defendant fails to accept an offer of judgment by the claimant, and the amount of the final judgment against the defendant is greater than the amount of the offer of judgment, then the court shall modify the judgment by including the claimant's reasonable attorney's fees and costs, not to exceed $50,000. S. 687, supra, § 101(d). "Such fees shall be offset against any fees owed by the claimant to the claimant's attorney by reason of final judgment." S. 687, supra, § 101(d). This $50,000 limitation is a modification of S. 640, which did not limit a defendant's liability for the claimant's reasonable attorney's fees and cost.

For the claimant who fails to accept an offer of judgment which later is found to be more favorable than the verdict, there are two possible results. If the claimant prevails but the amount of the final judgment is less than the offer of judgment, then the court shall reduce the final judgment by the amount of collateral benefits the claimant has received or is entitled to receive for economic loss. S. 687, supra, § 101(e). However, if the claimant does not prevail, there shall be no penalty for rejecting or failing to accept an offer of judgment. S. 687, supra, § 101(e). This different treatment of prevailing and nonprevailing claimants is a clarification and revision of S. 640, which did not limit the set-off for collateral source benefits to economic damages but also included non-economic damages, and which did penalize a non-prevailing claimant.

The effort to lessen the penalty upon injured plaintiffs for failing to accept an offer of settlement is commendable. Rightly or wrongly, many people will opt for a quick settlement of a product liability action when a profound injury has occurred. Insurmountable medical expenses, the trauma of trial, and the long-term emotional distress caused by the pendency of litigation are strong motivating factors for plaintiffs.

To reduce a prevailing plaintiff's judgment by the amount of collateral benefits received for economic losses imposes a rather heavy sanction on the prevailing plaintiff and is poor public policy. Neither plaintiffs nor defendants know with certainty what the outcome will be in a trial. To put the plaintiff in a position of having to give up collateral benefits for economic losses as punishment for making an incorrect estimation of a jury deliberation deprives injured plaintiffs of collateral sources to which they ordinarily have an independent entitlement (under the collateral source rule). People who have been victimized by product failures are not in a strong negotiating position, contrary to the assertions of the proponents of this bill. Indeed, they are absolutely desperate. Once a person in these circumstances understands the consequences of § 101(e), they will be hard pressed to push for trial. The prospect of losing collateral benefits for economic damages may well be too high a price to pay.

To force a plaintiff to settlement on a threat that they might lose essential damages may also deny the public of information regarding product risks. In the asbestos cases, it was only through repeated litigation that the public finally learned about the risks of asbestos and about the fact that the manufacturers of asbestos products were aware of that risk. When a product failure occurs, the first few cases may well reveal just the tip of the iceberg. The litigation process has proved to be an extremely effective mechanism for ferreting out product defects. For various contraceptive devices, toxic chemicals, automobiles, and other products, it has been litigation that has disclosed product failures.

The Committee might consider also the fact that some plaintiffs pursue litigation for reasons that have to do with bringing wrongdoers to justice. A public trial that exposes the wrongdoing of a defendant serves multiple functions beyond restoring the plaintiff. Such trials are an orderly way for dealing with anger and vengeance. They are a warning beacon to other potential victims. A process that forces people to settle rather than using the trial process denies us that forum.

CONCLUSION

S. 687 is a watered-down but nonetheless intrusive intervention into state tort law. If adopted, it would deny plaintiffs of certain critical consumer protection mechanisms inherent in the tort system.

The bill provides not a single benefit for consumers, while providing a host of benefits for manufacturers and insurers. The bill federalizes the state tort law system, stretching the limits of our understanding of federalism.

The legislation restricts the capacity for injured persons to secure punitive damages, a mechanism necessary to deter future misconduct. It changes the law of punitive damages in many states, imposing a federal will for no apparent reason.

The bill modifies the law in many jurisdictions pertaining to joint and several liability without any legitimate basis. In this area the drafters of the legislation have seen fit to declare compensation for pain and suffering to be somehow unimportant, increasing the obstacles in the pathway of a plaintiff who seeks to collect these damages.

Like its predecessors, this is a bill designed to provide certain manufacturers who have engaged in egregious misconduct with federal relief. Rather than allowing the states to sort out their own tort systems, as has been done for the last 200 years, this bill encourages the Congress to intervene, impose standards, and then jump ship, leaving to the next generation of lawyers the task of unscrambling this legislative package.

For the reasons stated in this testimony, I urge the rejection of S. 687.

APPENDIX A

The cases listed below involved dangerous products that were the subject of product liability litigation.

In re "Agent Orange" Product Liability Litigation, 565 F. Supp. 1263 (E.D.N.Y. 1983)

Pennsylvania v. *General Public Utility,* 710 F.2d 117 (3d Cir. 1983) (radioactive waste discharge)

Robinson, "Multiple Causation in Tort Law: Reflections on the DES Cases," 68 Va. L. Rev. 713 (1982) (DES)

Environmental Defense Fund v. *EPA,* 598 F.2d 62 (D.C. Cir. 1978) (PCB)

Michigan Chemical v. *Traveller's Indemnity,* 530 F. Supp. 147 (W.D. Mich. 1982) (PBB)

In re Northern District of California "Dalkon Shield" IUD Product Liability Litigation, 526 F. Supp. 887 (N.D. Cal. 1981)

Moore v. *Jewel Tea Company,* 253 N.E.2d 637 (1970) (exploding drain cleaners)

Gryc v. *Dayton-Hudson,* 297 N.W.2d 727 (S. Ct. Minn. 1980) (flammability of children's sleepwear)

Neal v. *Carey Can. Mines,* 548 F. Supp. 357 (E.D. Pa. 1982) (refusal to warn of asbestos inhalation despite overwhelming knowledge of hazards)

Dorsey v. *Honda Motor Co.,* 655 F.2d 650 (5th Cir. 1981) (case in which testing showed high probability of injury not revealed to purchasing public)

Airco v. *Simmons First National Bank,* 638 S.W.2d 660 (1982) (where defendant sold equipment for use in surgical processes with knowledge that the selector valve vital to the process had a high probability of defect)

Grimshaw v. *Ford Motor Co.,* 119 Cal. App. 3d 757, 813-14 (1981) (knowledge of dangerous fuel tank placement was consciously not disclosed)

Cantrell v. *Amarillo Hardware Co.,* 226 Kan. 681, 602 P.2d 1326 (1979) (defendant aware of a ladder's tendency to collapse refused to disclose that information to purchasing public)

Gillham v. *Admiral,* 523 F.2d 102 (6th Cir. 1975) (defendant sold television set which was defective caused numerous fires and injury without advising new purchasers of known existing hazard)

Sturm Ruger and Co. v. *Day,* 594 P.2d 38 (Alaska 1978), modified, 615 P. 2d 621 (1980) (defendant was aware that handgun it sold would fire while being loaded but refused to disclose that information and marketed product to the public)

Kociemba v. *Surle,* 707 F. Supp. 1517 (D. Minn. 1989), a case where the federal district court found that evidence had been presented which would have "allowed a reasonable jury to conclude that the defendant knowingly placed millions of women, especially [women who have not yet had children] at risk of serious infection, loss of fertility, and surgery for removal of internal organs. * * *

Wooderson v. *Ortho,* 681 P.2d 1038, cert. denied, 105 S. Ct. 365 (1984), where it was found that the defendant jeopardized the lives of those using its product by virtue of the fact that it had ignored evidence that its product caused renal failure.

APPENDIX B

The following are examples of state "tort reform":

1. Ala. Code §6-11-20 et seq. (Supp. 1988)
2. Alaska Stat. §09.17.020 (Supp. 1988)
3. Cal. Ann. Civ. Code §§3294, 3295 (West Supp. 1990)

4. Colo. Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986)
5. Conn. Cen. Stat. § 52-240(b) (Supp. 1989)
6. Fla. Stat. Ann. §§ 768.72 through 768.74 (West Supp. 1989)
7. Ga. Code Ann. § 51-12-5.1 (Supp. 1989)
8. Idaho Code § 6-1604 (Supp. 1989)
9. Ill. Ann. Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989)
10. Ind. Code Ann. § 34-4-34-2 (Burns 1986)
11. Iowa Code Ann. § 668A.1 (West 1987)
12. Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989)
13. Ky. Rev. Stat. §§ 411.184, 411.186 (1988)
14. Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988)
15. Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990)
16. Mont. Code Ann. § 27-1-221 (1987)
17. Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989)
18. N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988)
19. N.J. Stat. Ann. § 2A:58C-5 (West 1987)
20. N.D. Cent. (Page Supp. 1988)
21. Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988)
22. Okla. Stat. Ann. tit. 23, § 9 (West 1987)
23. Or. Rev. Stat. §§ 30.925; 18.540, 41.315 (1987)
24. S.C. Code Ann. § 15-33-135 (Supp. 1988)
25. S.D. Rev. Code § 21-1-4.1 (1987)
26. Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 et seq. (Vernon Supp. 1990)
27. Utah Code Ann. § 78-18-1 (Supp. 1989)
28. Va. Code Ann. 8.01-38.1 (Supp. 1989)

PREPARED STATEMENT OF THE WHIRLPOOL CORP.

Whirlpool Corporation, the world's largest manufacturer of major home appliances, strongly supports the Product Liability Fairness Act (S. 687). We have a global presence with sales and marketing to over 120 countries and manufacturing facilities in 11 nations. Our distribution in the U.S extends to all 50 states with 11 plant facilities in 7 states.

Because of our expansive distribution, we find that our products in the U.S. are subject to a vast array of widely differing product liability state laws. This has caused considerable uncertainty as we design products for the 90's and establish our long-term plans into the next century.

Passage of the Product Liability Fairness Act will help to improve a highly uncertain business climate. "Clear and convincing evidence" standards for punitive damage awards, a 2-year statute of limitations, disallowing suits when claimants use of alcohol or illicit drugs was more than 50 percent of the cause for injury, and elimination of joint and several liability for non-economic damages are among the bill's sound provisions. We would also endorse strengthening the bill to include more standardized manufacturer defenses (e.g. compliance with government recognized standards/specifications) and a statute of repose for consumer goods.

S. 687 will help to mitigate confusion created by often conflicting patchwork of state laws. In addition, this legislation is a balanced proposal that helps to protect manufacturers from frivolous and costly lawsuits while insuring the rights of consumers.

The Product Liability Fairness Act is highly important in controlling spiraling product liability costs, unleashing America's innovative talents and improving the competitive posture of U.S. companies in domestic markets and in the global community. We urge the Consumer Subcommittee's prompt passage of this important bill.

Thank you for the opportunity to comment.

PREPARED STATEMENT OF THE COALITION FOR UNIFORM PRODUCT LIABILITY LAW

The Coalition for Uniform Product Liability Law ("CUPLL") is comprised of over 100 manufacturing companies representing numerous segments of American industry including businesses as diverse as tool manufacture, aviation, and food manufacturing companies. Since its formation in 1981, CUPLL has been committed to improving our slow, inequitable and unpredictable product liability system through federal reform. Because our current laws burden consumers, injure industry, reduce employment, and hurt American competitiveness, CUPLL seeks to obtain reasonable reforms to our product liability system that will help provide efficient and equitable means of resolving claims about defective products.

DEVELOPMENT OF S. 687

S. 687 is the culmination of 17 years of effort to develop a national approach to the important issue of product liability reform. In the mid-1970's, product liability was first recognized as a serious problem of interstate commerce which, in the view of many businesses and academic observers, had become a crisis and required a Federal response. Throughout the late 1970's and early 1980's, a number of Federal task forces and working groups recommended a variety of product liability reforms.

Congress has been involved in developing product liability reform legislation during the past 13 years. The first product liability reform bills were introduced in the 97th Congress and legislation has been introduced on the subject during each subsequent Session of Congress. As the legislation evolved, significant changes were added to provide more benefits for claimants. The result is that the Product Liability Fairness Act is a balanced bill incorporating many pro-consumer provisions, as well as provisions requested by small business owners.

S. 687'S PRO-CONSUMER PROVISIONS

Opponents of S. 687 have repeatedly attempted to label product liability legislation as anti-consumer and pro-manufacturer. Such labels for this legislation are false. In fact, CUPLL members believe that S. 687 is heavily pro-consumer. For example, the Bill maintains a consumer's full right to sue if he or she has been injured; provides a streamlined system for expedited case settlement; does not set caps on awards an injured party can receive; and in the long run, will ensure consumers with greater access to goods and services at reasonable prices.

The legislation also has many pro-consumer provisions that advantage claimants without any corresponding benefit for manufacturers. Many of these provisions will substantially increase defendants' legal costs although they will have no such impact on claimants. Examples of such provisions include:

- A more liberal statute of limitations trigger than in many states. By tolling the statute until a claimant has discovered the harm and its cause, S. 687 creates a statute of limitations period that is longer than available now in approximately 21 states. (Section 204).
- Disincentives for defendants that refuse settlement offers without any comparable penalty for claimants who refuse to settle. This is a provision that gives claimants advantages over defendants unlike current Federal Rule 68. (Section 101).
- Penalties for defendants that refuse to participate in alternative dispute resolution ("ADR") procedures. No comparable penalties would be assessed against a claimant who refuses to participate in ADR. (Section 102).
- A statute of repose that is longer than that used by many states and that preempts state laws. (Section 204).
- A statute of repose that, unlike most state statutes of repose, does not bar a claimant's suit if the claimant would not be eligible for compensation under any State or Federal workers' compensation law. (Section 204).
- A provision that requires manufacturers or product sellers to pay attorneys' fees for subrogation claims if the manufacturer or product seller asserted a defense of employer or coemployee fault. (Section 205).

S. 687 IS A COMPROMISE

Despite the fact that S. 687 gives advantages to claimants in many respects and disadvantages defendants, CUPLL supports S. 687 because CUPLL recognizes that S. 687 is a compromise bill. Even though S. 687 will not be fully satisfactory to either manufacturers or consumers, CUPLL supports S. 687 as a reasonable compromise that protects consumers and lowers the costs of litigation.

MISUSE OR ALTERATION

CUPLL supports inclusion by the Senate of an additional provision that reduces the amount of damages for which a manufacturer or product seller is liable by the percentage of responsibility for the claimant's harm attributable to misuse or alteration of the product. This provision is included in the nonpartisan House of Representatives legislation, H.R. 1910, "The Fairness in Product Liability Act of 1993."

This misuse or alteration provision would reduce the damages to which a claimant is entitled only if it is established by a preponderance of the evidence that the harm to the claimant was proximately caused by—(1) alteration of a product contrary to the manufacturers or product seller's express warnings or instructions; or (2) use or alteration of a product involving a risk of harm which was known or should have been known to the ordinary consumer of the product.

Including a misuse or alteration provision in S. 687, such as is found in the H.R. 1910, would improve the predictability of product liability awards for manufacturers and product sellers. Claimants would not be allowed to be rewarded to the extent they have caused their own injury without impairing the total protection is still afforded to the innocent claimant. This change will ultimately make products more available and affordable to the general public and, like the other provisions already included in S. 687, will enhance the international competitiveness of American products.

PREPARED STATEMENT OF THE CONFERENCE OF CHIEF JUSTICES

This Statement is submitted by the Conference of Chief Justices, the primary representative of the State courts, providing them with national leadership and a national voice. The Conference of Chief Justices (CCJ) is composed of the highest judicial officers of the 55 existing State, Territorial and Commonwealth court systems and the District of Columbia. CCJ represents the State courts in the same way as the National Governors Association represents the State executive branches.

This Statement is prompted by an invitation from the Consumer Subcommittee of the U.S. Senate Committee on Commerce, Science and Transportation to the Conference of Chief Justices to testify on S. 687, the Product Liability Fairness Act of 1993. This Statement expresses CCJ's long-standing position on Federal product liability legislation, and our escalating concern abut the sober consequences of routine Congressional preemption of State court law.

To come quickly to the point, if the primary goal of this legislation is to provide consistency and uniformity in tort litigation, we are concerned that its effect will be the opposite. Preempting each State's existing tort law in favor of a broad Federal product liability law, will create additional complexities and unpredictability for tort litigation in both State and Federal courts, while depriving victims of defective products of carefully reasoned principles and procedures already developed at the State level. The critical experience of State courts with the long process of interpretation and consistency on major points of product liability law, tells us that Federal legislation is not the answer. Re-inventing tort law must occur by and through State courts and legislatures situated to determine and control the impact of reform within their own communities.

Confronting a mismatch over the last ten years, between genuine problems versus the predetermined reform efforts to Federally "fix" product liability law, CCJ has challenged popular tort-litigation fallacies: the products litigation explosion; the erratic and excessive award of damages; the insurance crisis; the chilled products innovation and business competitiveness; and, the unpredictable legal environment of products litigation.[1] Such allegations still are being used to generate support bills like S. 687. However, to find information for shaping an effective policy and a workable federalism, we must look beyond the myths to the realities of the situation. Consequently, it is with focus on sound empirical research and first-hand experience with the administration of justice in a State-Federal system, that CCJ opposes S. 687.

Our intention is not to bore you with a long recitation of statistics, but a few numbers from the State courts are instructive.[2] In 1991, roughly 10 percent of the 7 mil-

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[1](1983) CCJ Resolution: opposing S. 2631.
(1987) CCJ Resolution: favoring state-by-state resolution of tort reform issue.
(1988) CCJ Resolution: reaffirming opposition to broad federal preemption of state tort law and opposing H.R. 1115, the Uniform Product Safety Act.
(1988) CCJ Resolution: opposing S. 473 and H.R. 2238, the General Aviation Accident Liability Standards Act.
(1990) CCJ Congressional Testimony: opposing S. 1400, the Product Liability Reform Act, before the Senate Consumer Subcommittee of the Committee on Commerce, Science and Transportation (Feb. 22).
(1990) CCJ Congressional Testimony: opposing S. 1400, the Product Liability Reform Act, before the Senate Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary (Jul. 31).
(1991) CCJ Congressional Testimony: opposing S. 640, the Product Liability Reform Act, before the Senate Consumer Subcommittee of the Committee on Commerce, Science and Transportation (ESP. 12).
(1991) CCJ Congressional Testimony : opposing S. 640 before the Senate Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary (Aug. 5).

[2]For over fifteen years, the National State Court Statistics Project, a joint effort of the Conference of State Court Administrators, the State Justice Institute, the U.S. Bureau of Justice Statistics, and the National Center for State Courts, has been the only effective mechanism for collecting and compiling statistical data on the work of State courts. The State courts' statistics,

lion new civil findings in State general jurisdiction courts were tort cases (700,000), see attached Chart 1: The Composition of Civil Filings (1991). Only about 4 percent of the new tort filings in State general jurisdiction courts were product liability cases (only about 28,000 products cases in 1991), see attached Chart 2: Composition of Tort Filings (1991). Product liability cases decided at trial comprise less than 3 percent of all torts reaching trial.[3] Between 1986 and 1992, new non-auto tort filings (e.g. product liability, medical malpractice, defamation) remained relatively constant, falling and rising only moderately over that period, and ending in 1992 at a level just slightly above the 1986 level, see attached Chart 3: Total Non-Auto Tort Filings Trends (1986-1992).[4]

Awards are neither erratic nor excessive. Awards for compensatory damages are and closely related to the severity of the injury and the economic harm suffered by victims.[5] Punitive damages are: very rarely awarded,, already tightly controlled by most State legislatures.[6] and are not responsible for the "crisis" in the availability and affordability of issuance.[7]

If the search is for a single settled law, the goal will not be achieved through Federal legislation. S. 687 would preempt all related state law and substitute Federal standards, with changed and untested terms and concepts.[8] The new standards of S. 687 would be imposed in a single overlay upon the 55 existing State and Territorial court systems as well as the Federal courts. The overlay will fit somewhat differently in each instance and will impact some States more heavily than others. But in each instance we will have, in conjunction with existing State practices and procedures for tort law, a new and contradictory system of laws for product liability cases.

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used in this Statement to describe tort filings and trends, are taken from: State Court Caseload Statistics: Annual Report 1991 (January 1993), National Center for State Courts: Williamsburg, VA, pp. 20-22.

[3] The composition of torts decided at trial reflects numbers gathered from 27 large urban trial courts in 1989. These numbers are consistent with 1993 preliminary (unpublished) figures reported by jurisdictions currently participating in the national Civil Trial Court Information Network (CTCN), a two-year project, funded by the U.S. Bureau of Justice Statistics and managed by the Research Division of National Center for State Courts. CTCN statistics are derived from 16 reporting jurisdictions, which together averaged a rate of 2.7 percent of the tort cases, excluding asbestos, being decided at trial; half of the 16 jurisdictions reported products' trial rates of less than 3 percent.

[4] Data collected through the Administrative Office of the U.S. (Federal) Courts, excluding asbestos cases, show that, from 1985 to 1991, Federal court filings have declined almost 40 percent; see Galanter, Marc, Statement on S. 640, Senate Consumer Subcommittee (Sep. 1991). Analysis of both State and Federal court civil caseloads indicate that a more significant increase in tort filings may be found in property rights cases. Within a given state, filing trends suggest that variations or "spikes" in the number of product liability filings are related to state legislative changes enacted during that period. For example, in several states, anticipating new state statutes expected to disadvantage plaintiffs, spikes reflected the hastening of plaintiff to file under existing rules.

[5] U.S. Government Accounting Office, Product Liability: Verdicts and Case Resolution in Five States, GAO/HRD-89-99 (September 29, 1989). Looking at 21 years of product liability verdicts, researchers with the American Bar Foundation find that jury verdicts in products cases are not incoherent and unpredictable, but rather, have persistent, intelligible patterns. Their patterns of product liability cases that went to trial are quite different from the rhetoric of tort reform. The system is not described by cases involving consumer products, pharmaceutical products or recreational equipment. Instead it is a system described first by cases involving products encountered in the workplace and second by cases involving vehicle-related products. The most likely plaintiff are male, blue-collar workers with injuries affecting their wage-earning capacity, see Daniels, Stephen, and Martin, Joanne, (1993) Don't kill the Messenger 'Till You Read the Message: Products Liability Verdicts in Six California Counties, 1970-1990, Justice System Journal V. 16, N. 2, pp. 69-95.

[6] Thirty-nine states either do not permit punitive damages or have taken steps to reduce the frequency and size of the punitive damage awards through state-level tort reform. Following Haslip (111 S. CT. 1032 [1991]), even some of the nine remaining states have tightened their standards, see note 5 in Koenig, Thor and Rustad, Michael, The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform on Punitive Damages in Products Liability, Justice System Journal V. 16, N. 2, p. 23.

[7] U.S. Government Accounting Office, Liability Insurance: Effects of Recent "Crisis" on Businesses and other Organizations (1988) GAO/HRD-88-64). Wall Street Journal, ABA Report Urges Overhaul of Insurance liability Laws and Antitrust Exemption, (12/18/88) B1.

[8] CCJ is not routinely opposed to all expansion of federal jursdiction. For instance, it does not oppose legislation which would create new, but limited, access to federal courts for mass tort cases arising from a single catastrophic event. It is too often overlooked that there presently exists among the States a high degree of uniformity on major points of product liability, achieved over many decades through tens of thousands of cross citations of precedents in State case law and by resort to such widely accepted sources as the Restatement of Torts, the Uniform Commercial Code, and the National Conference of Commissioners on Uniform Law.

It follows that the Federal standards, however well crafted, will be applied in many different contexts and inevitably will be interpreted and implemented differently, not only by the State courts but also by the Federal Corts. Since the legislation does not create Federal question jurisdiction or a Federal cause of action, it would leave primary adjudication to State courts, where these cases have been traditionally tried. Access to the Federal courts will come only by diversity jurisdiction.[9]

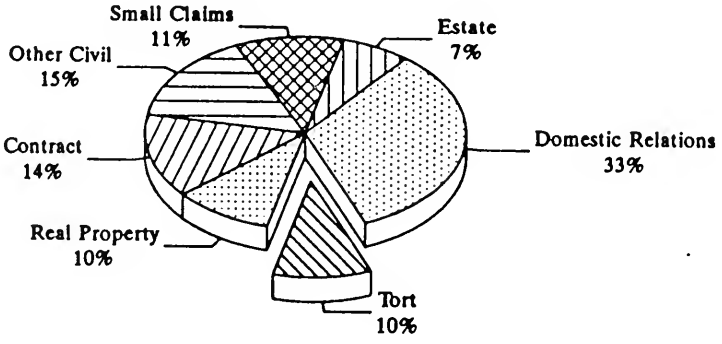
So we will not only have State courts interpreting and applying a mix of State and Federal law in the same case, but we will also have the Federal courts, under diversity jurisdiction, interpreting and applying the same mix. However, State supreme courts will no longer be, as they are today, the final arbiters of their tort law. Federal statutory standards, even without Federal question jurisdiction, will make the Supreme Court of the United States the court of last resort for a new class of cases, cases wrought with State and Federal questions stretching far beyond its current jurisdiction. A legal thicket is inevitable and the burden of untangling it, if it can be untangled at all, will lie only with the Supreme Court of the United States, a court which many experts feel is not only overburdened but also incapable of maintaining adequate uniformity in existing Federal law as it is variously interpreted by the 13 United States Courts of Appeals.

The consequences of S. 687 for federalism are incalculable. With the proposed legislation reaching so far into substantive civil law, States will be forced to provide the judicial structure but will not be permitted to decide the social and economic questions, in the law which their courts administer. Enactment of S. 687 would alter in one stroke, the fundamental federalism inherent in this country's tort law. CCJ still firmly holds that tort reform remedies must lie with State courts and legislatures, situated to determine the social and economic impact of present law in their own communities.

CCJ is confident that the emergence of a cumulative, reliable body of knowledge abut the tort system will not provide definitive answers to questions of policy, for the legislative process also involves value choices, which means poetical choices. But it is the hope of the Conference, that relevant information, cumulative experience, and value of the principles of federalism embodied in our present system of tort law might rescue us from debates dominated by myth and fallacy.

Again, CCJ thanks you for the invitation to express our views on S. 687. The Conference will be pleased to consider questions this Committee may have.

CHART 1—COMPOSITION OF CIVIL CASELOAD FILINGS—GENERAL JURISDICTION TRIAL COURTS



N = 7 million civil filings.
National Center for State Courts (1993).

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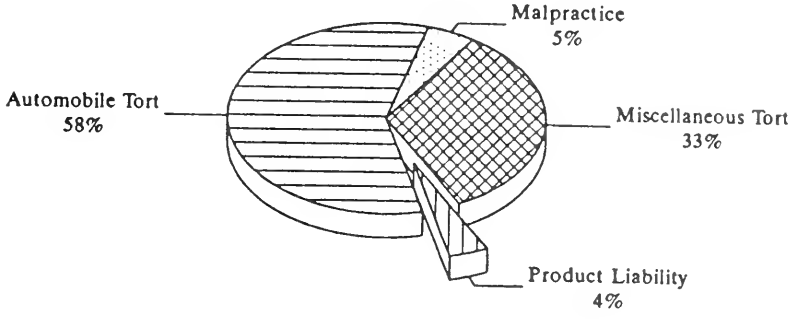
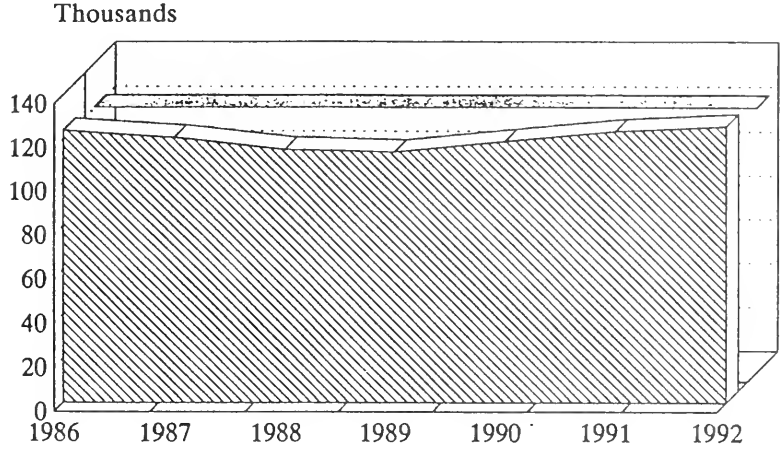
[9]The Federal Courts Study Committee (FCSC) does not specifically discuss routine product liability litigation; however it excludes it from federal jurisdiction, based on FCSC recommendations for diversity jurisdiction.

CHART 2—COMPOSITION OF TORT FILINGS—GENERAL JURISDICTION COURTS (1991)



Data from FL, CT, NV, WI.
National Center for State Courts (1991)

CHART 3—TOTAL NONAUTO TORT FILINGS—TREND FOR NINE STATES



AZ, CA, CT, FL, HI, MD, MI, NC, TX.
National Center for State Courts (1993)

QUESTIONS ASKED BY SENATOR GORTON AND ANSWERS THERETO BY MR. SCHWARTZ

Question. How many states have abolished joint liability altogether? How many additional states have modified joint liability through enactment of reforms, such as section 206 in S. 687?

Answer. Nine states have abolished joint liability.[1] An additional 18 states have modified joint liability.[2] Most of the states that have modified joint liability have used a "percentage" approach; in a nutshell, if the defendant's fault falls below a certain percentage of total blameworthiness, its liability will only be several and not joint.

The problem with this approach is it makes a certain percentage "a gate" to an all or nothing result. An injured plaintiff will not recover her full economic damages or her non-economic damages, in total, if the defendant's fault falls below that demarcation line, e.g., 25 percent.

The reform of joint liability that appears in Section 206 of S. 687 has been enacted in two states: California in 1986 and Nebraska in 1991. The California approach came into law by referendum (approved by over 60 percent of those who voted in the election). As the testimony of California trial attorney Suzelle Smith reflects, there have been no problems with this approach in California; it is regarded as fair by both the plaintiff and defense bar.[3]

There is a clear rationale underlying this approach. It begins by noting that the basis for joint liability is "risk distribution," not fault. A defendant is asked to bear responsibility beyond what a jury has found, because it is thought to be able to better "bear the risk" than the plaintiff. This risk distribution rationale works with respect to economic losses, but is totally out of place with respect to non-economic losses. Non-economic losses such as pain and suffering are an inherent part of the fault system, not a "risk distribution system," such as workers' compensation.

In sum, the approach taken in S. 687 about joint liability, set forth in Section 206, has a clear rationale (unlike other approaches), and it has been proven fair and without problems.

Question. How many states have adopted a standard of clear and convincing evidence for punitive damages?

Answer. Twenty-five states have adopted the standard of clear and convincing evidence: 19 by statute and 6 by caselaw.[4]

Question. Ms. Gilbert also presented the case of Mr. Fred Barbee, whose wife had a Bjork-Shiley heart valve. How would the provisions of S. 687 have affected Mr. Barbee's case had it gone to trial?

Answer. The allegations in the Bjork-Shiley heart valve litigation are that its manufacturer wrongfully withheld information about product risks, both before and after the product was manufactured. Section 203(a)(2)(A) indicates that a defendant will not obtain protection from punitive damages if it withheld information from the FDA either "before or after pre-market approval. * * *" Therefore, S. 687 would have no affect on Mr. Barbee's ability to recover compensatory damages. In addition, S. 687 would not affect the ability of litigants, such as Mr. Barbee, to recover punitive damages if it is shown that the manufacturer wrongfully withheld information from the FDA about risks associated with the heart valve.

Question. Ms. Gilbert and Professor Finley both argued that punitive damages were important to ensure that drug and medical device manufacturers produced safe products. What incentives does S. 687 create for manufacturers to produce products that are as safe as possible given their inherent risk?

Answer. Apart from five states,[5] punitive damage law does not automatically differentiate between companies that have obtained pre-market approval and properly reported product risk information to the FDA and those that do not. While a company that complies with FDA requirements is going to be in a better position to argue against a punitive damage charge, there are no guarantees that it will be successful.

Under S. 687, this unfair result would change; appropriate compliance with FDA pre-market approval and pre- and post-marketing product risk reporting to the FDA would be a defense to punitive damages. The approach set forth in S. 687 creates

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[1] Alaska, Colorado, Utah, Vermont (by judicial decision), and Wyoming have abolished joint liability in all cases. Arizona, Idaho, North Dakota, and Washington have abolished joint liability, except in a limited category of cases involving intentional torts or hazardous waste.

[2] States which have modified joint liability are California, Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New York, Ohio, Oregon, South Dakota, and Texas.

[3] Statement of Suzelle Smith before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, Sept. 23, 1993 hearing.

[4] States which have adopted the "clear and convincing evidence" burden of proof by legislative action are Alabama, Alaska, California, Georgia, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, and Utah. States which have adopted this burden of proof standard by judicial decision are Arizona, Hawaii, Maine, Maryland, Tennessee, and Wisconsin.

[5] Arizona, New Jersey, Ohio, Oregon, and Utah.

an incentive on the part of drug companies to fully and completely share appropriate risk information with the FDA both before and after a product is manufactured. Reporting requirements are not always crystal clear, and there are areas of uncertainty. S. 687 provides FDA counsel with a clear "carrot" to urge adverse risk reporting. Also, the jury would be instructed about the rules set forth in S. 687. Such an instruction would provide a plaintiff's lawyer with a very strong argument that a manufacturer who failed to comply with FDA pre-market approval should, indeed, be punished.

Question. Professor Finley argued that a manufacturer who does not engage in conduct in conscious, flagrant disregard of safety should have no concern about punitive damages suits. Do you agree?

Answer. In the practical world, Professor Finley's argument, unfortunately, does not hold up. Manufacturers have been found liable when they have engaged in little more than negligence or gross negligence. For example in *Hodder* v. *Goodyear Tire & Rubber Co., 426 N.W.2d 826 (Minn. 1988), cert. denied, 492 U.S. 926 (1989), a manufacturer of a truck rim that was over 26 years old was subject to substantial punitive damages, even though it had attempted to provide accurate safety instructions to those who assembled such rims. In a recent Texas case, General Chemical Corp.* v. *De La Lastra,* 852 S.W.2d 916 (Tex. 1993), a manufacturer of a shrimp cleaner, who warned that its product could only be used safely in open-air areas was found subject to liability to plaintiffs who simply did not follow the instruction.[6] In sum, the case law is replete with examples of situations where a defendant has been subject to punitive damages even though it did not engage in "conscious, flagrant disregard of safety."

Question. Could you clarify what constitutes economic as opposed to non-economic damages? In the case of a homemaker who became totally disabled because of a defective product, what economic damages would be available?

Answer. Section 3(6) defines "economic loss" as "any pecuniary loss resulting from harm, including but not limited to medical expense loss, work loss, replacement service loss, loss due to death, burial costs, and loss of business or employment opportunities. * * *" In the case of a homemaker who became totally disabled because of injuries caused by a defective product, her medical costs would be covered, and any assistance she needed to replace each function she performed as a homemaker (cooking, cleaning, taking care of children) would be covered. All would be economic losses.

Question. In response to a question, you indicated that market correctives existed to prevent insurance companies from overcharging for product liability insurance through greed or inefficiency. Can you elaborate on your response by explaining what these mechanisms are and to what extent they are actually used by businesses?

Answer. On September 25, 1991, President Reagan signed into law the Risk Retention Act. The proposal had received strong bi-partisan support in both Houses of Congress. The Risk Retention Act allows small businesses to group together and form "risk retention groups" to self-insure for product liability. Risk Retention Act premiums, including both product liability and other liability areas, reached close to $1 billion in 1993.

Small business is very sensitive to insurance rates and premiums, and if they believe that they are over-charged (or if the insurance for non-rational reasons becomes unavailable) they can form risk retention groups. If larger businesses believe that they are being overcharged (either through greed or inefficiency), they can establish their own self-insurance subsidiary. A number of large companies have done so in response to uncertainties in the insurance market.

In sum, existing market mechanisms help ensure that any savings brought about by S. 687 will be passed along by insurance companies to their customers. If such savings are not past along, but retained "through greed," market mechanisms exist for insureds to form their own self-insurance pools or insurance subsidiaries.

Question. Ms. Nimmons mentioned in her testimony that she has trouble obtaining raw materials because of suppliers' liability concerns. In addition, Senator Lieberman testified that medical device manufacturers had been cut off by several major raw materials suppliers. Is this simply irrational business behavior based on an uneducated fear of product liability, or can this be explained as a rational business decision? Which provision of S. 687, if any, address the suppliers' liability concerns?

Answer. The suppliers' concerns are quite rational. E.I. du Pont de Nemours and Company has announced that it will cease supplying raw materials to manufactur-

[6] Plaintiffs argued that the product should have included a warning to the effect that failure to follow instructions would result in death.

ers of certain medical devices and other products that bear a high product liability risk. A supplier's decision along these lines is understandable. Their profit on raw material is relatively small; nevertheless, should a liability problem arise, they are likely to be brought into a lawsuit, and subject to very large liability exposure. For example, in a million dollar case where a supplier was found to be one percent responsible, it could end up bearing 100 percent (the full million dollars) worth of liability. Cf. *Walt Disney World Co.* v. *Wood,* 515 So. 2d 198 (Fla. 1987).

Their concerns will not be eliminated by S. 687, but they will be abated by Section 206 on joint liability. In the hypothetical cited, if economic losses were $300,000 and pain and suffering damages were $700,000, the supplier would only be liable for one percent of the $700,000, the precise amount it was found to be responsible by a jury of its peers.

Question. Senator Lieberman testified that in some cases, companies that improve products face the prospect that the improved product design will be used as evidence that older products were defective. Do you agree? To what extent can liability be imposed for older designs, even if those designs were state-of-the-art at the time of manufacture?

Answer. Senator Lieberman is correct. In a number of states, juries are permitted to consider safety designs that a company implemented after a problem arose with its product and use that evidence in deciding about liability. While the majority of states would not allow evidence of product safety improvements to be used to prove that a manufacturer's older products were defective, a number of larger states such as California and New York permit such use. Since products move in interstate commerce, manufacturers may be chilled about making product safety improvements because they will, by such conduct, expose themselves to liability for their older products.

You also asked to what extent liability can be imposed for older designs, even if those designs were state-of-the-art at the time of manufacture. If state-of-the-art means "custom," liability can be imposed in all states, since "custom" is not a defense in any jurisdiction and not even admissible as evidence in some jurisdictions. If by state-of-the-art one means the best science available at the time of manufacture, this is only a "factor" in a number of states. In at least two states, Massachusetts and Hawaii, state-of-the-art is irrelevant. In the Massachusetts case of *Simmons* v. *Monarch Machine Tool Co. Inc.*, 596 N.E.2d 318 (Mass. 1992) the court stated: "The vendor is presumed to have been fully informed at the time of the sale of all risks. The state of the art is irrelevant, as is the culpability of the defendant. * * *" This is a minority view, but those who sell products in interstate commerce must be concerned about such minority views.

Question. Ms. Gilbert claims that the Ford Pinto, the Dalkon Shield, Copper-7 IUDs, silicone gel breast implants, Bjork-Shiley heart valve, GK pickup trucks with side-saddle fuel tanks, all-terrain vehicles, Jeep CJ, super-absorbent tappons, and unsafe product packaging are examples of unsafe products improved or driven from the market by product liability. Assuming, arquendo, that these products were all defective and were all modified or taken off the market because of product liability concerns, how would cases against the manufacturers of these products have been affected by S. 687?

Answer. There would be no change in outcome in the cases cited by Ms. Gilbert. S. 687 does not change standards of liability against manufacturers. With respect to punitive damages, the standard in Section 203(a) of S. 687 is "conscious, flagrant indifference to the safety of those persons who might be harmed by a product." Complaints in each of the cases cited by Ms. Gilbert asserted that the defendant had engaged in just such conduct.

Question. Ms. Gilbert argues that the product liability laws on Japan and Europe are becoming more like those in the United States, so there is no reason to enact S. 687. Is this correct? How do the proposed Japanese and European product liability systems compare with U.S. product liability laws as they would exist under S. 687?

Answer. While a much more detailed answer could be provided, in general, Ms. Gilbert appears to be referring to the EC Directive. It is currently the law in thirteen European countries and Australia and is the model for product liability legislation being considered in Japan.

Under the EC Directive, compliance with all government regulatory standards is a complete defense to any liability. In contrast, under S. 687, compliance with regulatory standards is only ensured for punitive damages (not existent in Japan and most European countries) and then only with respect to two government agencies, the FDA and FAA. Further, the defense only applies if the products have been subject to pre-market approval and all reporting requirements have been met both be-

fore and after the product is marketed. There is no requirement for post-market regulatory compliance in the EC Directive.

The EC Directive provides a 10-year statute of repose for all goods, both those that cause toxic harm and those that cause immediate physical injury. The statute of repose in S. 687 is limited to capital goods, the amount is 25 years (not 10) and that limit will not be respected unless the individual obtains workers' compensation.

It is also interesting to note that both Japanese and European product liability laws are administered by judges, not juries; there is no contingent fee; and, pain and suffering damages, if they exist at all, are only a small percentage of economic losses. In the United States, pain and suffering damages may be eight to ten times economic losses. Finally, punitive damages are virtually non-existent in the European countries and Japan.

Question. Ms. Gilbert argues that product seller liability should not be changed because product sellers can exert substantial pressure on manufacturers to produce safe products by refusing to carry unsafe and untested products. Do you agree? What are the logistical realities of requiring product sellers to inspect and be familiar with the design considerations of each product they sell?

Answer. Products move through warehouses without providing wholesalers with opportunities for detailed inspection of design or testing.

Under the present system, product sellers may be treated as if they were manufacturers in all cases. This would change under S. 687. In that regard, a key advantage of S. 687 is that it creates an incentive on product sellers to differentiate between responsible and irresponsible manufacturers of products. If product sellers are not negligent themselves, they will not be subject to liability for manufacturers' design or other choices, unless the manufacturer lacks assets in the jurisdiction or cannot be reached by judicial process. In a nutshell, it places incentives for product injury prevention on the manufacturer, with respect to risks that the manufacturers can prevent; at the same time, it places incentives on the retailer or wholesaler for risks it can prevent.

Question. What are the steps that a successful plaintiff must go through to enforce a judgment against a U.S.-based manufacturer? What are the steps that a successful plaintiff must go through to enforce a judgment against a manufacturer in another country?

Answer. To enforce a judgment against a U.S. manufacturer, one simply has to obtain a judgment in court. If the manufacturer fails to pay, the judgment can be enforced by having the court execute an order against the defendant's property. If necessary, the court can even order the defendant's property to be seized and subject to a forced sale.

It can be much more difficult to enforce a judgment obtained in the U.S against a manufacturer whose assets are located in a foreign country. Because the U.S. is not a member of the Hague Convention, one must depend on comity.[7] As a result, foreign courts may impose various proof requirements before honoring a U.S. judgment, such as proof that jurisdiction existed over the manufacturer, that due process was satisfied, and that sufficient evidence existed to support the judgment. Of course, a foreign court seeking to protect its manufacturer from judgment could find that these proof requirements have not been met. This is most likely to occur where jurisdiction in the U.S. was based on a long-arm statute, the predicate for jurisdiction in many product liability cases. Furthermore, obvious practical problems exist to frustrate one's ability to enforce a judgment abroad. For instance, there is the expense of filing a case in a foreign jurisdiction, usually with a different linguistic and judicial system. In sum, a plaintiff may be subject to interminable delays and, in the long run, not have the judgment respected.

Question. Compare and contrast discovery procedures available against a U.S.-based manufacturer, and those available against a foreign-based manufacturer?

Answer. Discovery procedures are much more ample in the U.S. than any country in the world. Virtually any relevant document can be obtained against a U.S.-based manufacturer and testimony can be obtained from the Chief Executive Officer to a work person who knew or had reason to know something about the defective product. Discovery procedures in Europe and Asia are much more limited; they usually involve replies to written interrogatories.

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[7] The Hague Convention is a treaty arrangement between member nations to honor court decrees from other member nations.

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